BEFORE THE HEARING OFFICER
CIVIL SERVICE COMMISSION
CITY AND COUNTY OF DENVER, COLORADO
Case No. 15 CSC 10

In the matter of:

Barton Malpass (P93026)
Detective in the Classified Service of the Denver Police Department
Petitioner

FINDINGS, CONCLUSIONS, DECISION AND ORDER

Hearing was held in the above-captioned matter on April 12, 2016. Petitioner was represented by Donald Sisson, Esq., and Lucas Lorenz, Esq., of the firm Elkus and Sisson. Respondent was represented by Kristin A. George, Esq., and Charles T. Mitchell, Esq., Assistant City Attorneys. Without objection, the Respondent’s Exhibits 1, 2, and 3, were received, Ex. 1 being the Internal Affairs investigation file in Case P2015-0234; Ex. 2 being the DPD Discipline Handbook; and Ex. 3 being OMS 117.03 of the Dept. Of Safety EEO Policy from the DPD Operations Manual. Also received were Petitioner’s Exhibits A through R.

The Deputy Director of Safety, (DDS), issued his Departmental Order of Disciplinary Action on October 13, 2015, Ex. 1(Bates 0065-0070). In that Order he approved the Chief of Police’s Written Command that Petitioner violated RR-138, Discrimination, Harassment, and Retaliation, of the Denver Police Department Operations Manual, as it pertains to OMS 117.03(2), by his actions on July 3, 2015, in the Records Bureau, where he engaged in prohibited conduct. That rule states:

RR-138 Discrimination, Harassment, and Retaliation
Members of the Department are expressly prohibited from engaging in any form of discrimination, harassment, or retaliation based on any class or personal characteristic protected by federal, state, or local law, or otherwise violating Department of Safety EEO Policy found in section 117.03, the Disclosure of Information Protected Policy found in section 117.06, the Biased Policing Policy Statement found in section 118.01, the Biased Policing Policy found in section 118.02 or the Equal Employment Opportunity for Individuals with Disabilities Policy found in section 505.13 of the Denver Police Operations Manual.

The portion of the EEO policy referred to by the DDS states:

OMS 117.03(2), Department of Safety EEO Policy, of the Denver Police Departments Operations Manual provides,

Conduct Prohibited – Examples of conduct that could violate this policy include...
c. Physical conduct such as assault, unwanted touching, blocking normal movement, or interfering with work directed at a person because of protected basis...

FINDINGS

The basis for the complaint filed against Petitioner in this matter occurred on July 3, 2015, at the Records Bureau of the Denver Police Department. Petitioner, a 23-year employee of the Denver Police Department, is a detective, presently assigned to work the pawn recovery unit. This necessitates that two to four times per week he takes pawn tickets to the Records Bureau and picks up pawn tickets that have been recorded. There are approximately 20 employees in this unit, of whom 4 or 5 are men.

On July 3, 2015, Petitioner testified that he went to the Records Bureau to turn in pawn tickets. He stated he spoke with employee Catrina Garcia, and also acknowledged the other employees working in the unit that day. He further testified that on his way out of the unit he stopped where employee/trainer Felicia Foil was training employee Alison Schroeder. He stated that he had to pass these employees to leave the unit, and that Alison Schroeder was seated at a computer doing data entry while Felicia Foil was standing nearby guiding Schroeder. He also testified that when he initially walked up he rested his hands on the shoulders of Schroeder and asked how her day was going. He also asked Schroeder about her tan, and said that he may have touched her arm, and that he did touch her cheek to move hair stuck to her mouth. He denied that Schroeder shrugged when he rested his hands on her shoulders, and said that when he touched her cheek that she asked if that was a hair, and said thanks to him. He denied hearing Foil say that he could lose a hand. He then stated that Foil told him, with a smile, that they had work to do and that he was only there to talk to Schroeder anyway. He replied to Foil that he talked to everyone, and moving behind Foil to leave, admitted that he tickled Foil's sides above her waist.

Schroeder testified that she saw Petitioner a few times per week. She stated that she did not initiate e-mail exchanges with Petitioner. Regarding Ex. 1 (Bates 00062), a copy of an e-mail from Petitioner to her, dated June 05, 2015, which refers to her "...good looks...", she found this comment weird. In another e-mail dated June 11, 2015, Petitioner typed "BOO! Do I scare you, really?" The following day, June 12, 2015, Petitioner typed:

Leaving today for two weeks of vacation. Hope you guys can make it without me?? Ha. See you when I get back.
Couple pictures of my son's racing. First picture is him on ESPN2 w/ a national #1 plate. He had to beat 4300 kids in a weekend.
Cute kid huh? They say he looks like his daddy??
Take care Alison with one L.
On July 3\textsuperscript{rd}, she testified that Petitioner did push back hair from her face, and commented on her tan, and that she shrugged her shoulders to dissuade him because it made her uncomfortable. During cross-examination Schroeder stated that Petitioner massaged her shoulders but that she did not at that time state an objection to either his touching of her arm or the massaging of her shoulders. After Petitioner had left the unit Schroeder received an e-mail from him, dated Fri. July 03, 2015, at 9:31 a.m. which stated: “Thanks, you got me in trouble!” Ex. 1, (Bates 0061)

Foil testified that Petitioner came to the Records Bureau 2-3 times per week, and would be there for 20 minutes. On July 3\textsuperscript{rd} she saw him speak with others in the unit before coming over to where Schroeder was working. Foil stated that Petitioner pushed hair away from the face of Schroeder twice, and that she told him he could lose a hand that way. Foil stated that Petitioner rubbed the left shoulder of Schroeder for a few seconds, and that she then told him that he needed to leave because they had work to do. She testified that Petitioner then walked around her back and tickled her sides with both of his hands. The following Monday, July 6\textsuperscript{th}, Foil informed her supervisor, Hannah Engle, off the record, of Petitioner’s conduct, and was instructed to make it on the record. Engle then briefed Sgt. Beveridge, who initiated the Complaint Intake Form.\textsuperscript{1}

In his Order of Disciplinary Action and at the hearing herein, the DDS set forth and testified regarding the basis for his finding of violations of RR-138. He testified that he reviewed the entire IA investigatory file including witness statements, the statement of Petitioner, and the Chief’s report signed by Commander Battista. He stated that he learned that Petitioner visited the Records Bureau frequently, and relied on statements in the IA file that Petitioner “made rounds” at the unit, with some witness statements noting that Petitioner made references to the appearance of female employees. He referred specifically to the witness statement of Supervisor Hannah Engle, who was not called to testify, but who said in her investigatory statement that Petitioner was typically chatty and a little flirtly with the female employees, and that she had asked him to leave a couple of times because he was making Ms. Schroeder uncomfortable and was interfering with her training, and that she has been keeping a careful eye on him since he seemed to favor Ms. Schroeder. Specifically, the DDS testified that he relied on the statements of Alison Schroeder and Felicia Foil in making the findings in his Order, that he found Petitioner’s comments disturbing, and that he found no evidence that the statements against Petitioner were made because of jealousy by others. He testified that this formed the basis for his finding of gender motivation in Petitioner’s conduct toward women which was sexual in nature and was

\textsuperscript{1} The intake form, dated 07/06/15, Ex. 1, (Bates 0004), gives the time of the occurrence as 0945 on July 3\textsuperscript{rd}. I find that it more likely occurred prior to the 9:31 a.m. e-mail from Petitioner to Schroeder on July 3\textsuperscript{rd}. Ex. 1, (Bates 0061)
unwanted or unwelcome. He found the brushing of Ms. Schroeder’s hair and the rubbing of her arm were shown to be unwanted by Ms. Schroeder shrugging away his contact. Further, after being told to leave by Ms. Foil, Petitioner then tickled her as he was leaving. He testified that there was no evidence of Petitioner ever seeking permission for his actions.

The DDS testified that having found that Petitioner’s conduct was unwanted, he referred to the Matrix, which required that such a violation could be classified as a Category C to Category F. As to Ms. Schroeder, he found the conduct to be a Category C violation, having “...a pronounced negative impact on the operations or professional image of the department, or on relationships with other officers, agencies or the public.” He found that Petitioner’s disciplinary history provided neither mitigation nor aggravation, and therefore assessed the presumptive Level 3 penalty of two fined days. Regarding Ms. Foil, he found that Petitioner’s conduct toward her was more egregious because he undermined her authority as a trainer/supervisor, and concluded that this was a Category D violation as “...substantially contrary to the values of the department...”. He again found that Petitioner’s disciplinary history provided neither mitigation nor aggravation, and therefore assessed the presumptive Level 5 penalty of ten days suspension.

During cross-examination Petitioner Counsel questioned the DDS regarding his testimony that Petitioner’s conduct was “sexual” in nature, asking where in his Order it said “sexual”. The DDS responded that his Order referred to “harassment”. He said that Petitioner having denied any intent other than being friendly, he considered Petitioner’s comments as evidence of conduct of a sexual nature, that Ms. Foil had communicated that Petitioner’s conduct was unwanted, and that Petitioner’s tickling of Ms. Foil undermined her authority. Petitioner Counsel listed the witness statements of Records Bureau employees who did not find Petitioner’s conduct inappropriate. The DDS gave an extended explanation of his conclusions, and his discounting of the imbalance in the number of employees who did not consider the conduct inappropriate, and noted the statement of Francine Garcia, who did not testify, whose statement (Pet. Ex. H) reflects that she found Petitioner over friendly with certain females, and that she felt uncomfortable because she knew that Petitioner made Ms. Schroeder feel uncomfortable, and that Petitioner’s e-mails to Ms. Schroeder she considered too personal. Ms. Garcia further stated that she did not report Petitioner’s conduct to a supervisor, but that the trainers were aware of it and that all the employees would make comments about Petitioner’s attention given to Ms. Schroeder.

In questioning the DDS, Counsel for Petitioner also inquired about the reporting obligations set forth in 117.03 (2) and (5), noting that there had been no prior complaints against Petitioner for harassment. The DDS testified that the fact that there were no prior complaints was not controlling on whether the incident alleged here had occurred. Counsel also questioned the DDS about his
attendance at pre-disciplinary meetings. The DDS responded that the OMS sets out the process and procedures for disciplinary proceedings, and that his actions were in accord with the OMS. Similarly, the DDS agreed that Commander Michael Battista had acted in this proceeding on behalf of Chief of Police Robert White, which was also in accord with the OMS and was not in violation of Denver Charter Sec. 9.4.14.

Petitioner's Appeal

Counsel for Petitioner contends that the Order of Discipline herein exaggerates the conduct of Petitioner and tarnishes his exemplary career with the Denver Police Department. He notes the fact that Petitioner has had only three instances of discipline over his twenty-three year career, and that those disciplines were oral or written. He also notes that Petitioner has received a Community Service Award and a Commendatory Letter, during his career. (Pet. Ex. N). He argues that Petitioner was interested in people and tried to get to know them, that the record fails to show that Petitioner went to the Records Bureau for personal reasons, and that the vast majority of employees in the Records Bureau found Petitioner was friendly and were not offended by his actions.

Counsel for Petitioner further argues that the decision herein should be overturned because of procedural violations, in that the Chief of Police's Written Command, Pet. Ex. M, was signed by Commander Michael Battista, rather than by the Chief of Police, contrary to the Denver Charter; and in that the Deputy Director of Safety was involved early in this investigation, and attended the Chief's hearing in this matter, contrary to rules.

Further, Counsel argues that Respondent's statement of the EEO policy, Res. Ex. 3, is overly broad, and does not forbid touching, and that there is no evidence of Petitioner intent, or that Petitioner acted against anyone based on their protected basis.

CONCLUSIONS

Initially, I reject Petitioner's arguments that the discipline herein should be dismissed because the Deputy Director of Safety participated in the investigation prior to issuance of the Chief's Disciplinary Action, and that the Chief's Action was signed by his designee, Commander Battista. Petitioner was not deprived of any rights by these actions. Further, I reject Petitioner's narrow reading of the requirements of the Denver Charter and of the DPD Disciplinary Handbook regarding these matters.

The issue presented here does not involve whether Petitioner engaged in the alleged conduct. Rather, the question goes to the issue of whether the conduct, which Petitioner admits, violates the policy stated in 117.03 Department of Safety EEO Policy. Counsel argues that there is no showing that Petitioner
intended to harass anyone, that there is no showing that Petitioner had a personal intent in his conduct, other than to be friendly, and that there is no evidence of a sexual intent.

Petitioner's argument is that his comments about appearance, and his "touching" of shoulders, arm and cheek, were merely friendly gestures, and that Respondent failed to show any intent to harass or discriminate against either of the women involved. Petitioner further points to the rule itself, Rule 117.03(2)(c), which does not specifically forbid touching.

I find that the filing of the Complaint herein forms the basis for a conclusion that Petitioner's actions were unwanted. I further find that Petitioner was not initially entitled to engage in such conduct. Just because a Rule does not specify that you cannot do something does not mean that you have a right to engage in that conduct. Counsel for Petitioner argued that the rule as applied herein would prohibit shaking hands or a pat on the back. It is possible to describe numerous scenarios which involve "touching", or other "contact", from bumping into someone in a crowd to a "good job" pat on the back. It is even possible to envision a handshake being a violation, if the hand were rejected and yet the offering party persisted in taking hold of the rejecting party. I recognize that many, even most, of such contacts would not constitute harassment in violation of RR-138. Rather, it is necessary to view the circumstances of each case, to consider the relationship, if any, between the individuals involved, and to determine whether the conduct forms a pattern.

I find that the extensive record before me provides a sufficient basis for the conclusions reached by the DDS. As noted, there are statements in the record from other employees in the Record Bureau regarding Petitioner's conduct toward the female employees in the Bureau, and especially his actions toward Alison Schroeder and their effect on her. I find from this record that a pattern is established of Petitioner engaging in unwanted touching, both of Ms. Schroeder and Ms. Foil. While Petitioner prefers to think of his actions as merely being friendly, others considered his actions to be "flirty", and especially to make Ms. Schroeder uncomfortable. I also note that Petitioner's 9:31 a.m. e-mail on July 3rd, indicates his recognition that his conduct was inappropriate, since, at the time he sent the e-mail, Ms. Foil had not decided whether to make any complaint. As noted supra, her complaint was filed on July 6, 2015.

I therefore find that there is sufficient evidence in the record before me that the DDS was not clearly erroneous in concluding that Petitioner engaged in unwanted contact with both complainants Alison Schroeder and Felicia Foil. Having found that Petitioner violated RR-138, the DDS then considered Appendix F of the DPD Handbook and determined that violations of RR-138 under the Matrix were listed as violations under categories C through F. He found the conduct of Petitioner toward Ms. Schroeder was a violation of Category C, having "...a pronounced negative impact...". Under the Matrix this constituted the least possible discipline. I find this decision was not clearly erroneous. He further found the conduct of Petitioner toward Ms. Foil was a Category D violation, "as conduct "...substantially contrary to the values of the Department...", based upon his determination that the conduct undermined her position as a
trainer/supervisor of Ms. Schroeder. I find this decision was not clearly erroneous.

**DECISION**

The finding of a violation of RR-138 Discrimination, Harassment and Retaliation regarding Alison Schroeder, and the penalty of two fined days, is affirmed.

The finding of a violation of RR-138 Discrimination Harassment, and Retaliation regarding Felicia Foil, and the penalty of 10-days suspension without pay, is affirmed.

**ORDER**

The Departmental Order of Discipline is Sustained.

**NOTICE OF APPEAL RIGHTS**

Pursuant to Charter §9.4.15(E) and Rule 12 §11(1) and (2), the decision of the Hearing Officer may be appealed to either the Civil Service Commission, or directly to District Court. Any appeal to the Commission shall be initiated by filing a Notice of Appeal with the Commission, within fifteen (15) days of the date noted on the certificate of service/mailing of the Hearing Officer's decision by the Commission. Any appeal to District Court shall be initiated in accordance with the Colorado Rules of Civil Procedure currently in effect.

Dated this 5th day of May, 2016,

at Littleton, Colorado

Daniel C. Ferguson
Hearing Officer
CERTIFICATE OF MAILING

I hereby certify that on this 5th day of May, 2016, I have served the foregoing FINDINGS, CONCLUSIONS AND ORDER by in Case No. 15 CSC 10, In the matter of Barton Malpass (P93026), by arranging that a true and correct copy be electronically filed by email to:

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Cc: Dan Ferguson, Hearing Officer

CIVIL SERVICE COMMISSION

/s/ Jeannette Madrid
By: Jeannette Madrid