CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Appeal No. 87-09

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

EFREM CARTER,

Appellant/Petitioner,

vs.

DENVER SHERIFF'S DEPARTMENT, DEPARTMENT OF SAFETY, Agency, and the City and County of Denver, a municipal corporation,

Agency/Respondent.

This matter is before the Career Service Board on Appellant's Petition for Review. The Board has reviewed and considered the full record before it and **AFFIRMS** the Hearing Officer's Decision, dated February 17, 2010, on the grounds outlined below.

I. JURISDICTION

Jurisdiction is proper under both CSR 19-61 C. (policy-setting precedent) and 19-61 D. (sufficiency of the evidence).

II. FINDINGS

All of Appellants arguments center around the Agency's Internal Affairs investigation report which was not admitted into evidence at the hearing. For the reasons addressed below, we find Appellant's arguments misplaced.

First, Appellant contends that Deputy Director Malatesta was permitted to testify about information she reviewed in the IA report and that such testimony was inadmissible hearsay. We disagree. Hearsay is an out of court statement offered to prove the truth of the matter asserted in the statement. However, an out of court statement may be offered for another relevant purpose. For example, in a lawsuit over a traffic accident, a police officer may testify about the contents of a 911 dispatch call,

not to prove the truth of the statements made in the call, but to explain why he was driving through crowded city streets at 80 mph. Such testimony is not hearsay.

In this case, Director Malatesta testified about the information she reviewed in the IA report to explain the reasons and the basis for her decision to terminate Appellant's employment, which were certainly relevant issues in the career service hearing, and the Hearing Officer admitted it for that purpose. (Transcript, p. 112:4-6). Malatesta's testimony was not hearsay.

Moreover, even if it could be considered hearsay, "strict rules of evidence shall not apply" in career service hearings. CSR 19-50 A. See also, *Industrial Claims Appeals Office v. Flower Stop Marketing Corp.*, 782 P.2d 13, 18 (Colo. 1989) (recognizing that the Administrative Procedure Act permits state administrative hearing officers to receive hearsay evidence ordinarily not admissible under the rules of evidence). In disciplinary actions, the decision-maker is rarely (if ever) the person who actually investigates allegations of employee misconduct and therefore she must rely upon information provided from others and her testimony about that information is permissible.

However, the career service hearing is a *de novo* hearing in which the Agency has the burden of independently proving alleged misconduct and the hearing officer is charged with the responsibility of making an independent determination regarding that misconduct, based on the evidence presented. Here, the record amply demonstrates that the Hearing Officer did so.

Aside from Malatesta, seven witnesses testified, including Appellant himself. Two witnesses testified that they saw Appellant make the announcement over the public address system, and three witnesses identified Appellant from his voice. Additionally, the witness whose name is redacted from the Hearing Officer's decision testified that Appellant tried to threaten and intimidate him, and two other witnesses testified that Appellant tried to get them to lie about what they saw or heard. Appellant testified at the hearing and denied all of this alleged misconduct. It is within the province of the Hearing Officer to judge the credibility of witnesses and the strengths or weaknesses of the evidence presented.

Although Appellant claims the Hearing Officer relied upon the IA report in making his decision, the record belies this claim. As noted above, eight witnesses testified at the hearing and the Hearing Officer's decision demonstrates that he carefully weighed and analyzed the testimony of the witnesses as it applied to each charged rule violation. The IA report is mentioned once in the decision, and then only in passing, in a discussion of a rule violation the Hearing Office did not sustain: "Carter was ordered to be interviewed by IA on 4/15/09 [Exhibit 6-16]. However, it was unclear whether Carter was aware, or should have been aware, the investigation was underway when he intimidated _____ on 4/12/09. Therefore a key element of this violation is not established." Decision, p. 8-9.

Finally, Appellant contends that the Hearing Officer was required to make a determination regarding the reliability and trustworthiness of the IA report under the factors set forth in *Flower Stop*. However, *Flower Stop* involved a contested claim for unemployment benefits where the referee's decision was based solely on the hearsay statements of an unidentified individual who complained to the employer about the employee's driving. Recognizing that the Administrative Procedure Act permitted hearsay testimony, the Court was faced with determining whether the entire hearing could be based on hearsay:

> [T]he use of hearsay evidence alone does not violate due process principles as long as the hearsay is sufficiently reliable and trustworthy and as long as the evidence possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs." (emphasis added).

782 P. 2d at 18. As we have already stated, the record in this case demonstrates that the Hearing Officer's decision was based on the testimony of eight fact witnesses, not the IA report, and even if his decision mentioned the IA report, this is not a situation where the only evidence presented at the hearing was hearsay evidence. To the extent Appellant is trying to say that principles of fairness and due process required the Hearing Officer to make a determination about the reliability of a report that was not admitted into evidence, his contention is without legal support.

Moreover, we note that although the IA report was not admitted into evidence, that report was listed as an agency exhibit on the prehearing statement (R. p. 40) and was listed as Exhibit 6 at the hearing (R. pp. 80-183). We also note the CSR 19-45 permits pre-hearing discovery and therefore Appellant had notice of and access to the IA report prior to the hearing and had every opportunity to subpoena the author of that report if he thought it was somehow important to do so. More significantly, the witnesses who were interviewed as part of the IA investigation testified at the hearing and were subject to cross-examination.

III. ORDER

IT IS THERFORE ORDERED that the Hearing Officer's Decision of February 17, 2010, is **AFFIRMED.**

SO ORDERED by the Board on June 3, 2010, and documented this 1st day of July, 2010.

BY THE BOARD:

Felicity O'Herron, Co-Chair

Board Members Concurring:

Nita Henry
Patti Klinge

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **FINDINGS AND ORDER** on July 2, 2010, in the manner indicated below, to the following:

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