

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

Appeal No. 127-03

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

JAMES COLLINS, Appellant,

Agency: DEPARTMENT OF HUMAN SERVICES, and the City and County of
Denver, a municipal corporation.

Hearing in this matter was held before Michael S. Gallegos, Hearing Officer, on October 24, 2003, in the Career Service Hearings Office, 201 West Colfax, 1st Floor, Denver, Colorado 80202. Appellant, James Collins, appeared and was represented by Cheryl Hutchison, AFSCME. The Agency was represented by Assistant City Attorney Niels Loechell. Lisa Ayala was the Agency's advisory witness at hearing.

Within these Findings and Order, the Hearing Officer refers to James Collins as "Appellant"; to Lisa Ayala as "LA"; the Department of Human Services as the "Agency" 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 alleged acts 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

The parties stipulated to the acceptance into evidence of the Agency's Exhibits 1 through 4. The Agency's Exhibit 5 was accepted into evidence at hearing, without objection. Appellant offered no Exhibits. At the time of hearing, the witness listed below as Veronica "Ronnie" Abraham had changed her last name from Abraham to Rodriguez.

FINDINGS OF FACT

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

1. Appellant is an employee in career status. He was disciplined for his actions on the evening of June 6, 2003 and the early morning hours of June 7, 2003.. By letter dated July 30, 2003, the Agency's Deputy Manager/Acting Manager, Valerie Brooks (Brooks) imposed a 10-day suspension. The disciplinary suspension was served by Appellant from August 4 through 15, 2003.
2. LA and Leroy Martinez (Martinez) are full-time Agency employees with a regular work week of Monday through Friday. They are friends. LA and Martinez also hold part-time janitorial jobs for La Prino Foods, working 5:00 to 10:00 p.m., Monday through Friday.
3. On Friday, June 6, 2003, after work at the Agency, LA and Martinez went to their part-time jobs but left those duties early to attend a birthday gathering for an Agency co-worker, Danielle Gomez (Gomez). The birthday gathering took place at the Chili Pepper Restaurant, near the dance floor, in a room at the far South side of the restaurant. LA and Martinez arrived at the restaurant, in separate vehicles, at approximately 8:45 p.m. At that time, there were approximately 30 other Agency employees there for the birthday gathering.
4. The Hispanic Coalition is an organization of Agency employees. On Friday, June 6, 2003, the Hispanic Coalition held its annual awards banquet at the Chili Pepper Restaurant. A number of Agency employees attended the

awards banquet which was held in a banquet room at the far North side of the restaurant. Appellant did not attend the Hispanic Coalition Awards banquet.

5. Appellant arrived at the birthday gathering for Gomez at approximately 8:45 p.m. on June 6, 2003. Appellant was intoxicated when he arrived. He started hugging, grabbing and "bothering" a number of the female employees at the gathering. Appellant asked co-worker Pamela Espinosa (Espinosa) for a ride home and told her that he had been at the Hispanic Coalition Awards banquet. Espinosa told Appellant that she would not give him a ride home. Appellant tried to dance with Espinosa 4 or 5 times and Gomez had to get between them to keep Appellant from bothering Espinosa. Appellant also questioned Veronica "Ronnie" Abraham (Abraham) about her pending divorce. Abraham told Appellant, "It's none of your business" but Appellant continued to question her about her divorce for a few minutes, then left her alone. In Abraham's opinion, Appellant was "very intoxicated".

6. When LA arrived at the restaurant, she went to a table where Agency co-workers were seated. Appellant said, "Hi" to LA and took her hand in greeting. Appellant squeezed LA's hand so tight that it hurt and for so long that LA had to pull her hand away. LA said "Hey, what are you doing? I'm not a dude", meaning "I'm not a man". Then LA shook her hand in the air to relieve the pain.

7. After ordering a beer, LA got up from the table and went to dance with her girlfriends on the dance floor. She then saw Martinez standing near a window. LA walked over to where Martinez stood. She and Martinez were talking, drinking a beer and leaning on the window sill when Appellant approached. Appellant asked, "Where's your husband?" The music was very loud and LA thought Appellant was asking if her husband was there. LA responded, "No". Appellant said, "What! You don't know where your husband is?" Then Appellant made a fist and hit LA on the chin. Appellant's fist hit with such force that it caused LA's head to snap back. Her head almost hit the window behind her. In a loud voice, LA told Appellant, "You don't ever touch me. You have no right to touch me."

8. Appellant intended for the contact with Appellant's chin to be a playful tap. However, he was intoxicated and could not judge his own use of force.

9. Appellant started yelling at LA. They stood yelling at each other for 15 to 20 seconds. Martinez positioned himself between them. Then LA grabbed her purse and went to the Ladies restroom. Appellant asked Martinez, "What did I do?" When LA returned from the restroom, Appellant was walking away from Martinez.

10. LA ordered a second beer but someone drank it while she was on the dance floor. When LA returned to the table, Appellant leaned across the table and shouted, "Forget you [LA]", calling her by name. She decided to leave the table, stand and talk to some friends. Appellant came up behind LA and tried to tackle her. That is, he used his upper body to push LA from behind. Appellant struck LA with sufficient force to knock her off balance into a male co-worker. Appellant struck LA in such fashion three times. It was very crowded. The first time Appellant tried to tackle her; she didn't see who it was. However, after the second time, LA made a point of looking to see who was shoving her. The third time Appellant rammed LA; he also struck Christine Quintana (Quintana).

11. Martinez left the restaurant at about 11:00 p.m. On his way out, he stopped to check on LA. He told her to stay with the others and not to go outside alone.

12. Throughout the evening, Appellant continued to consume alcohol. He kept asking Espinosa for a ride home. Espinosa began to feel uncomfortable about saying "No" to Appellant. When Espinosa tried to exit the restaurant, Appellant saw her, grabbed her by the back of her jacket and pulled her back toward him. Appellant asked Espinosa if she was leaving. Espinosa said she was just going to the restroom and Appellant walked away. Then Espinosa asked a friend to watch her leave the restaurant to be sure that Appellant didn't follow Espinosa out of the restaurant.

13. At about 12:30 a.m. on June 7, 2003, LA went to the bar in the middle of the restaurant with Quintana. Appellant approached LA from the left as she was sitting at the bar. Appellant extended his hand and said, "We've been friends for 10 years..." LA responded, "Yeah, yeah..." Then Appellant head-butted LA making contact with her left upper forehead. LA stood up and was very angry. At that point, Abraham announced that she was leaving and told LA, "I'll walk you outside." LA left the restaurant at approximately 12:45 a.m., June 7, 2003. She was not intoxicated when she left or at anytime during the time she spent at the restaurant on the evening of June 6 and the early morning hours of June 7, 2003.

14. The next morning LA told her husband about the incidents involving Appellant the night before. She also talked to Abraham and Gomez by telephone. LA felt frightened, harassed and violated. She decided to report the incidents to her supervisor, Jay Morein (Morein). LA called Morein on Sunday, June 8, 2003 to set up a meeting for Monday, June 9, 2003.

15. Appellant was placed on investigatory leave from June 9 through 16, 2003.

16. On Monday, June 9, 2003, Gomez tried to talk with Martinez about the incidents involving Appellant and LA on Friday night, June 6, 2003. Martinez

told Gomez that he didn't want to talk about it and that he felt uncomfortable and intimidated.

17. On Monday, June 9, 2003, Chris Mootz (Mootz), the City Attorney for the Agency, was advised that criminal charges had been filed against Appellant for the incidents at the Chili Pepper on June 6 and 7, 2003. On June 9, 2003, Appellant was arrested at approximately 12:00 p.m. He bonded out that same day. Mootz requested Appellant's criminal record and noted that Appellant had a sentencing hearing set for Wednesday, June 11, 2003 on an unrelated alcohol matter.

18. On Wednesday, June 11, 2003, Appellant appeared in court for sentencing on an unrelated alcohol matter. Mootz also appeared at Appellant's sentencing hearing. When Appellant's attorney requested "work release", Mootz advised the judge that Appellant was on investigatory leave and that Mootz was unsure whether Appellant would return to work at the Agency. Therefore, the sentencing judge denied Appellant's request for assignment to the Work Release Program during his confinement. Appellant was incarcerated from June 11 to July 8, 2004 and was not given work-release

19. On Thursday, June 12, 2003, LA asked Espinoza to make a statement about the incidents at the Chili Pepper restaurant on June 6, 2003. Espinoza agreed. (Agency's Exhibit 5.)

20. LA also filed for a Temporary Restraining Order (TRO) against Appellant. LA was concerned regarding her safety at work. She felt that Appellant's actions on June 6 and 7, 2003 were "ugly, mean and hostile". LA pursued a Permanent Restraining Order (PRO) against Appellant and, as part of her preparation for hearing, she discovered Appellant's past criminal history which added to her fears. However, up to the date of hearing in this matter, Appellant abided by the Permanent Restraining Order.

21. Mootz attended the TRO and PRO hearings because both parties, Appellant and LA, were employees of the Agency and, at that time, worked in the same building. At the time of this disciplinary hearing, Appellant and LA worked in different buildings.

22. On June 16, 2003, Mootz called Appellant's attorney to advise that Appellant was no longer on investigatory leave.

23. Approximately 1 month after the June 6 and 7, 2003 incidents, Brooks interviewed LA, Espinosa and Abraham. At that time, all 3 interviewees were still upset, frightened and felt threatened by Appellant. They reported that, on the evening of June 6, 2003, Appellant had a lot to drink. Brooks also interviewed Appellant, who reported that he "didn't have that much" to drink.

24. By letter dated July 9, 2003, Appellant was charged with violations of Career Service Rules by threatening, fighting with, intimidating, or abusing employees; conviction of a crime which impacts the individual's ability to perform the duties and responsibilities of the job, and unauthorized absence from work.

25. Appellant argued that he should not be disciplined for an incident that took place, away from work, in a public restaurant. Brooks didn't consider where the incident occurred because the rule addresses the act(s) and status of employees, not where the act(s) occurs. (See CSR 16-50 A (8).) Additionally, Appellant felt that he should not be disciplined for unauthorized absence from work because, he alleged, he would have received work-release if Mootz hadn't appeared at Appellant's sentencing on June 11, 2003. Appellant argued that Mootz' attendance at Appellant's sentencing was improper.

26. In determining whether discipline should be imposed for Appellant's actions on June 6 and 7, 2003, Brooks considered the statements of LA, Espinosa and Abraham, the written statements of Appellant's listed witnesses to the incidents and Appellant's statements, work history and prior discipline. Brooks also considered Appellant's unauthorized absence from work from June 17 to July 8, 2003, while he was incarcerated.

27. In determining the level of discipline to be imposed, Brooks considered the severity of the June 6 and 7, 2003, incidents including the number of times Appellant made abusive, physical contact with LA and Espinosa, the fact that the birthday gathering was a gathering of Agency co-workers, that Appellant was intoxicated and that another Agency social function (the Hispanic Coalition Awards Banquet) occurred in close proximity.

28. At hearing in this matter, Espinosa testified that she was not afraid of Appellant and Martinez indicated that he was not intimidated by Appellant. The statements and indications by Espinosa and Martinez, at hearing, that they were not intimidated by Appellant are not credible. At hearing, LA appeared nervous, upset and frightened of Appellant. LA's demeanor and testimony at hearing are credible.

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. 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.) At hearing in this matter, the Agency met its burden to prove, by a preponderance of the evidence, that the acts upon which discipline was based occurred. (See Findings of Fact, paragraphs 5 through 23 and 28.) Appellants acts, on June 6 and 7, 2004, were inappropriate and in violation of Career Service Rules. Therefore, the undersigned Hearing Officer concludes that there is cause for discipline in this matter for violation of the following Career Service Rules:

a. CSR 16-50 A (8) Threatening, fighting with, intimidating, or abusing employees: Career Service Rules do not limit discipline for threatening, fighting, intimidating or abusive acts to those taking place at work or on City property. (See CSR 16-50 A and Findings of Fact, paragraph 25.) On 6 occasions over the course of the evening of June 6, 2003 and the early morning hours of June 7, 2003 Appellant made abusive, physical contact with LA. (See Findings of Fact, paragraphs 6, 7, 10 and 13.) The 6 contacts, taken individually or as a whole, meet common definitions of threatening, fighting, intimidating *and* abusive acts. Additionally, Appellant had 5 or 6 abusive contacts with Espinosa. (See Findings of Fact, paragraphs 5 and 12.) One month after the incidents, LA, Espinosa and Abraham were still upset, frightened and felt threatened by Appellant. (See Findings of Fact, paragraph 23.) Therefore, the Hearing Officer concludes that Appellant's actions on June 6 and 7, 2004, are in violation of CSR 16-50 A (8) and are cause for discipline.

b. CSR 16-51 A (4) Failure to maintain satisfactory working relationships with co-workers: As a result of the incidents on June 6 and 7, 2003, some of Appellant's co-workers remained in fear, LA sought a restraining order against Appellant and, at hearing with Appellant in the hearing room, Espinosa and Martinez felt it necessary to profess that they were *not* intimidated by Appellant. (See Findings of Fact, paragraphs 16, 20, 23 and 28.) Therefore, the Hearing Officer concludes that Appellant's actions on June 6 and 7, 2003 are evidence of Appellant's failure to maintain satisfactory relationships with co-workers, in violation of CSR 16-51 A (4).

c. CSR 15-60 A (13) Unauthorized absence from work: Appellant was on investigatory leave from June 9 through June 16, 2003. He was sentenced to jail time beginning on June 11, 2003. (See Findings of Fact, paragraphs 15 and 18.) Because Appellant was on investigatory leave at the time he was ordered to begin serving his sentence, he was not working and, therefore, was ineligible for the Work Release Program. The Hearing Officer concludes that it is irrelevant *who* informed the sentencing judge of Appellant's work status. The fact that Appellant was on leave from work was a proper

consideration for the sentencing judge in determining whether to allow work-release. Further, the Hearing Officer concludes that Appellant had no entitlement to work-release. Appellant should have planned for approved leave in the event of his failure to be approved for work-release. However, because Appellant did not apply for leave from June 17 to July 8, 2003, his absence from work was unauthorized and in violation of CSR 15-60 A (13).

3. 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, Brooks considered the investigation statements of LA, Espinosa and Abraham, the written statements of Appellant's listed witnesses to the incidents and Appellant's statements, work history and prior discipline. Brooks also considered the severity of the June 6 and 7, 2003, incidents including the number of times Appellant made abusive, physical contact with LA and Espinosa, the fact that the birthday gathering was a gathering of Agency co-workers, that Appellant was intoxicated and that another Agency social function occurred in close proximity.

Appellant's contact with LA on June 6 and 7, 2003, was not only physically abusive but also emotionally abusive. It is reasonable to conclude from his actions, during the early part of the evening, that Appellant was trying to fight with LA. (See Findings of Fact, paragraphs 6 and 7.) As the evening progressed, Appellant's abusive action became more physical, threatening and intimidating. (See Findings of Fact, paragraphs 10 and 13.) Appellant was also abusive to Espinosa and, as the evening progressed Appellant's abusive action toward Espinosa became more physical, threatening and intimidating. (See Findings of Fact, paragraphs 5 and 12.) Appellant's actions toward female co-workers on June 6 and 7, 2003, left lingering concerns and fear of him in the workplace. That is, Appellant's actions affected his co-worker's sense of security in their work environment. Therefore, the Hearing Officer concludes that a 10 day suspension is reasonably related to Appellant's acts in this case.

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 acts upon which discipline is based 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 27th day of February 2003



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

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in the United States Mail, postage prepaid, on the 27th day of February 2004, addressed to:

James Collins
665 Perry Street
Denver, CO 80204

Cheryl Hutchison
AFSCME
3401 Quebec St., #7500
Denver, CO 80207

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in interoffice mail, on the 27th day of February 2004, addressed to:

Niels Loechell
Assistant City Attorney

Diana Smith
Department of Human Services

