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

Appeal No. 310-01

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEAL OF:

Appellant: JOSEPH ENCINIAS

And

DEPARTMENT OF PUBLIC WORKS, WASTEWATER MANAGEMENT DIVISION, and the City and County of Denver, a municipal corporation.

NATURE OF APPEAL

The Appellant Joseph Encinias, (Appellant) is a Career Service Employee and has challenged his dismissal from his position as a Facility Maintenance Technician with Department of Public Works, Wastewater Management Division (Agency). The Agency dismissed the Appellant because of conduct that occurred on May 25th, 2001, and previous disciplinary action for the same sort of conduct. The Agency contends Appellant violated Career Service Rule (CSR) §§ 16-50 8), 18) and 20); 16-51 4) and 5).

Appellant contends the Agency violated CSR § 19-10 a) (3); CSR § 16-10; CSR § 16-20; CSR § 16-50; Colorado Constitution, Article II, § 25; U.S. Constitution, Amendments 5 & 14. Appellant denies all wrongdoing and is requesting to be reinstated with back pay.

INTRODUCTION

A hearing on this appeal was held before Michael A. Lassota, Hearing Officer for the Career Service Board. Appellant was present represented by Walter L. Gerash, Esq. The Agency was represented by Assistant City Attorney Richard A. Stubbs, Esq., with Reza Kazemian serving as advisory witness for the Agency.

The following witnesses were called and testified at the hearing: Dr. John Nicoletti, P.H.D., Roberta L. Walsh, Arthur Robinson, Todd Broceski, Corsenio Gonzales, Jeff Snyder, Donald DeFiore, Appellant Joseph Encinias, Lawrence Mason, Theodis Hall, Joseph M. Rosales, Carlos Guerra, Joseph Fisher, Rama Mallett, Reza Kazemian, Thomas Zaccaria, Michael Martinez, Douglas Wells and Gilbert Costello.

Exhibits 1-13, 15-20, 24, 25, 31 and Appellant's personnel file, were admitted into evidence either by stipulation or my ruling and were considered in this decision.

ISSUES ON APPEAL

Whether the Agency proved by a preponderance of the evidence that the Appellant violated provisions of the Career Service Rules.

If so, whether Appellant's dismissal was reasonably related to the seriousness of the offense(s), considering all of the circumstances, as required by the Career Service Rules?

Whether the Agency violated Career Service Rules or provisions of either the Colorado or U.S. Constitutions.

JURISDICTION

The alleged conduct that gave rise to this disciplinary action by the Agency occurred on May 25th, 2001. Appellant was notified of the Agency's contemplation of disciplinary action on July 9th, 2001. A pre-disciplinary meeting was held on July 17th, 2001. Appellant was advised of the disciplinary action against him by letter dated July 31st, 2001. Appellant filed his appeal with the Career Service Hearing Office on August 9th, 2001. Neither party has contested the jurisdiction of the Hearing Office to hear and decide this appeal.

Based upon these facts, I find that this appeal has been timely filed. And, under CSR §§ 19-10 (b) and 19-27, I have authority to affirm, reverse or modify the actions of the Agency.[1]

RELEVANT FACTS

1. On May 25th, 2001, around noon, Appellant returned from lunch to find a vehicle parked in his assigned space.

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[1] CSR § 19-10(b) provides:

> Actions subject to Appeal
> An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.
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> b) Actions of an appointing authority: Any action of an appointing authority resulting in dismissal, suspension, involuntary demotion, disqualification, layoff, or involuntary retirement other than retirement due to age which results in alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

CSR § 19-27 provides:

> The Hearings Officer shall issue a decision in writing affirming, modifying, or reversing the action, which gave rise to the appeal. This decision shall contain findings on each issue and shall be binding upon all parties.

2. Appellant called security to investigate, went into the Wastewater Treatment building, saw a man talking to Lawrence Mason and asked that man if he parked in Appellant's assigned space.

3. The man said he would move it and Mason said he would take care of it.

4. A verbal altercation between Mason and Appellant followed outside of Appellant's office.

5. Several people heard loud voices, only none understood what was being said

6. Appellant was upset about this altercation and tried to talk with his immediate supervisor, Jeff Snyder, about the incident, but could not find him. When Appellant did, Snyder advised Appellant to write a memo about the incident to Carlos Guerra, directing the memo through Snyder.

7. Upon learning Snyder was unavailable at the time, Appellant went to talk with Carlos Guerra, Mason's supervisor.

8. During that conversation Guerra also told Appellant to write a formal statement and contact his immediate supervisor. Guerra told Appellant it was not appropriate for anyone to feel threatened at work. Appellant's response to Guerra, which he forwarded in his memo to Theodis Hall, was:

> "Mr. Encinias stated that he was not fearful of anyone. Mr. Encinias also stated he was not fearful of anyone else, but that if Mr. Mason continued to mess with him, he would get his gun and shoot his ass. Mr. Encinias repeated his intent not to fight, but to resolve any further conflict with his gun, at least one more time."

9. Guerra next talked withTheodis Hall in Human Resources to relate to him the statement Guerra says Appellant made.

10. Guerra did not feel it necessary to take immediate action against Appellant without directions "from above". He did not sense any threat or danger from Appellant because, by the time the gun statement was made, Appellant was calmed down and using a conversational tone of voice.

11. The matter was further investigated by the Threat Assessment Team and on July 17th, 2001, a pre-disciplinary meeting was held.

12. Appellant appeared without representation and explained his side of the story.

13. Further investigation was conducted based on statements Appellant made in the pre-disciplinary meeting.

14. Appellant has a previous (May 1998) one day suspension for violence in the workplace.

15. Appellant was dismissed on July 31st, 2001.

DISCUSSION AND CONCLUSIONS OF LAW

As a 16 year employee, Mr. Encinias has Career Status as a Career Service Employee and may not be disciplined or dismissed without just cause.[2] Appellant is accused of violating the following Career Service Rules, Executive Orders, or Departmental Rules and Regulations:

§ 16-50 Discipline and Termination

A. Causes for Dismissal.

The following may be cause for dismissal of a career service employee. A lesser discipline other than dismissal may be imposed where circumstances warrant. It is impossible to identify within this rule all conduct which may be cause for discipline. Therefore, this is not an exclusive list.

8) Threatening, fighting with, intimidating, or abusing employees or officers of the City and County of Denver for any reason, including but not limited to: intimidation or retaliation against an individual who has been identified as a witness, as a party, or as a representative of any party to any hearing or investigation relating to any disciplinary procedure, or a violation of a city, state or federal rule, regulation or law.

18) Conduct which violates an executive order which has been adopted by the Career Service Board. (Executive Order-112 – Violence in the Workplace)

City and County of Denver, Executive Order No. 112, Violence in the Workplace, Issued on February 7th, 1995, states in pertinent part:

II. General Policy

Violence or threat of violence, by or against any employee of the City and County of Denver is unacceptable and contrary to city policy, and will subject the perpetrator to serious disciplinary action and possible criminal charges. The city will work with law enforcement to aid in the prosecution of anyone inside or outside of the organization who commits violent acts against employees.

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

A. Intimidating, threatening, or hostile behaviors, physical assault, vandalism, arson, sabotage, unauthorized use of weapons, bringing unauthorized weapons onto city

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[2] CSR § 5-62 provides:
Employees in Career Status
An employee in career status
1) may be disciplined or dismissed only for cause, in accordance with Rule 16, DISCIPLINE.

property or other acts of this type clearly inappropriate to the workplace

B. Jokes or comments regarding violent acts, which are reasonable perceived to be a threat if imminent harm.

C. Encouraging others to engage in the negative behaviors outlined in this policy.

VII. Disciplinary Action

Any violation of this policy by employees, including a first offense, will result in disciplinary action, up to and including dismissal.

§ 16-51 Causes for Progressive Discipline

A. The following unacceptable behavior or performance may be cause for progressive discipline. Under appropriate circumstances, immediate dismissal may be warranted. Failure to correct behavior or committing additional violations after progressive has been taken may subject the employee to further discipline, up to and including dismissal from employment. It is impossible to identify within this rule all potential grounds for disciplinary action; therefore, this is not an exclusive list.

4) Failure to maintain satisfactory working relationships with co-workers, other City and County employees or the public.

5) Failure to observe departmental regulations.

The Public Works Policies and Rules Handbook, in § 1, reads in part:

1. Workplace Environment

The success of Public Works depends on employees who establish and maintain a proper business atmosphere. This includes maintaining a high level of customer service, and respect for co-workers and citizens.

A. Workplace Violence

Violence, or threat of violence, is not acceptable and will not be tolerated in any of the City and County of Denver's work locations. It is the goal of the City and County of Denver to rid work sites of violent behavior or threats of such behavior. It is each employee's responsibility to prevent or defuse actual or implied violent behavior at work. To ensure and affirm a safe, violence-free workplace, the following will not be tolerated:

1) Intimidating, threatening or hostile behaviors, physical assault, vandalism, arson, sabotage, unauthorized use of weapons, bringing unauthorized weapons onto city property or other acts of this type clearly inappropriate ot the workplace.

2) Jokes or comments regarding violent acts, which are reasonably perceived to be a threat of imminent harm.

3) Encouraging others to engage in the negative behaviors outlined in Executive Order No. 112.

The City and County of Denver, Department of Public Works, is committed to maintain a safe work environment free from all forms of violence.

The City Charter, §C5.25 (4) and CSR §2-104 (b)(4) require the Hearing Officer to determine the facts in this matter "de novo". The Colorado Courts have held that this requires an independent fact-finding hearing considering evidence submitted at the *de novo* hearing and a resolution of the factual disputes. *Turner v. Rossmiller*, 35 Co. App. 329, 535 P.2d 751 (Colo. App., 1975).

The party advancing a position or claim, in an administrative hearing like this one, has the burden of proving that position by a "preponderance of the evidence". To prove something by a "preponderance of the evidence" means to prove that it is more probably true than not (Colorado Civil Jury Instruction, 3:1).[3] The number of witnesses testifying to a particular fact does not necessarily determine the weight of the evidence (Colorado Civil Jury Instruction, 3:5).[4] The ultimate credibility of the witnesses and the weight given their testimony are within the province of the Administrative Law Judge or Hearing Officer. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). As the trier of fact, the Hearing Officer determines the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

In its dismissal letter, the Agency claims Appellant violated the numerous Career Service Rules outlined above. Therefore, the Agency has the burden of proving the allegations contained in the letter of dismissal by a preponderance of the evidence.

The first CSR Appellant is alleged to have violated is §16-50 A 8). There was considerable testimony from both sides regarding an alleged statement Appellant made to Carlos Guerra, Lawrence Mason's supervisor, shortly following a verbal altercation, argument between Appellant and Mason. Guerra quoted Appellant in two memos to Theodis Hall of the Agency's Threat Assessment Team. The quotation stated that if Mason continued to "mess with him," that he (Appellant) would "...get his gun and shoot his ass."

Guerra has no stake in this matter, nothing to lose, by reporting this statement to his superiors. Appellant has everything to lose. Appellant was previously given a one day suspension, May 5th, 1998, for making threats in the workplace and knows another rule violation of this type could mean losing his job.

Testimony from Dr. John Nicoletti, P.H.D., who conducted violence training at the Agency, was Appellant's "gun" statement was a conditional threat. Nicoletti was asked on cross

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[3] The notes on use of Instruction 3:1 state: Generally, in all civil cases, "the burden of proof shall be by a preponderance of the evidence,..." citing C.R.S. § 13-25-127.

[4] The content of this instruction was approved as an instruction in *Swaim v. Swanson*, 118 Colo. 509, 197 P.2d 624 (1948). The rule stated is also supported by *Green v. Taney*, 7 Colo. 278, 3P. 423 (1884) and C. McCormick, EVIDENCE § 339, at 957 (E. Cleary 3 ded, 1984).

examination by Appellant's attorney if the statement "if attacked I will defend myself" was a threat. This was regarding questions by Appellant's attorney, during Appellant's unemployment hearing, about Appellant's "gun" statement. Nicoletti testified this too, was a conditional threat. Nicoletti's training to the employees and management was to take all threats seriously. Because of the argument between Appellant and Mason and the conditional threat made against Mason, the Agency's allegation Appellant violated this rule is affirmed.

The Agency next contends Appellant violated § 16-50 A 18) because his conduct violated Executive Order No. 112, Violence in the Workplace. Appellant's argument with another employee, loud enough for others to notice, combined with the conditional threat, are sufficient to find Appellant violated § II A) of (Executive Order No. 112). The Agency's allegation Appellant violated this rule is affirmed.

Appellant is alleged to have violated § 16-51 A 4). Appellant's argument with another employee is not a satisfactory working relationship with co-workers; therefore, the Agency's allegation appellant violated this rule is affirmed.

The last CSR the Agency alleges Appellant violated is § 16-51 A 5) regarding failure to observe departmental regulations. The Public Works Policies and Rules Handbook, in § 1 substantially copies Executive Order No. 112. For reasons already explained, the allegation Appellant violated this rule is affirmed.

JUSTNESS OF DISCIPLINE

The remaining issue is whether the discipline imposed is just given the circumstances. While the Hearing Officer may defer to the discipline imposed by the Agency, he is required to make an independent, *de novo*, finding and determination as to the reasonableness of the discipline consistent with CSR 16, DISCIPLINE.

The purpose of Rule 16 is stated in § 16-10:

> The purpose of discipline is to correct inappropriate behavior or performance. 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. The appointing authority or designee will impose the type and amount of discipline she/he believes is needed to correct the situation and achieve the desired behavior or performance.
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> The disciplinary action taken must be consistent with this rule. Disciplinary action may be taken for other inappropriate conduct not specifically identified in this rule.

In § 16-20 1) the appointing authority or designee is authorized to impose discipline from as slight as a verbal reprimand to as severe as dismissal. In § 16-20 2) the instruction is:

> Whenever practicable, discipline shall be progressive. However, any measure or level of discipline may be used in any given situation as appropriate. This rule should not be interpreted to mean that progressive discipline must be taken before an employee may be dismissed.

Appellant testified during both the pre-disciplinary and appeal hearing that he never mentioned a gun and never made the statement about getting "a gun and shoot his ass," referring to Mason. Appellant also testified during adverse direct examination at the appeal hearing, at the pre-disciplinary hearing, and during an unemployment benefits hearing that if Mason threatened him again he would defend himself. Appellant further testified during the appeal hearing, he had an unreported previous altercation with Mason about one year before this incident. Moreover, in Appellant's May 25th, 2001, written statement to Carlos Guerra and his testimony during the appeal hearing Appellant said: "I had to restrain my own temper from doing something that I know I would have regretted." The context of this statement refers to Appellant's frame of mind at the time of the incident with Mason. Although Appellant is illustrating his self restraint at the time of the incident, these do not sound like the statements of a peaceable man.

Lawrence Mason testified that the argument he had with Appellant was at a distance, no blows were struck, and there was no mention of any gun. He continued his testimony stating the whole incident was a misunderstanding, he never had a dispute with Appellant before, and they later shook hands and made up. The statement regarding never before having a dispute with Appellant is directly contradictory to Appellant's own testimony.

Theodis Hall and Joe Rosales were members of the Agency's Threat Assessment Team, (TAT) charged with investigating the incident. Rosales offered no testimony of any value during the appeal hearing. Hall testified he did not have enough information to believe whether or not the "gun" statement was made to Guerra. As a result, he did not do anything to have Appellant removed from the workplace. Appellant was not put on investigatory leave because he did not feel he had all the facts and this was not a action he could take. The TAT just gathered facts, reached no conclusions and made no recommendations.

Carlos Guerra testified that by the time the "gun" statement was made to him by Appellant, Appellant had calmed down. He did not sense any danger and Mason had already left work. Guerra did not take any action to have Appellant removed from the workplace. Guerra also testified it was not his call to advise investigatory leave: however, he would had he felt threatened, but he did not. There was no indication to Guerra, that from the time of the incident until Appellant's dismissal, Appellant might be violent towards others.

Reza Kazemian, Director of Wastewater Management, has Appellant under his command. He was the final decision maker in this disciplinary process. After reviewing all the evidence, he determined Appellant had violated the CSR's listed. The main factor considered was the "gun" statement made by Appellant to Carlos Guerra. In assessing the statement, Kazemian testified because Guerra had not worked directly with Appellant, there was no altercation between these two men, Guerra had nothing to lose and Appellant had everything to gain, Guerra's account of the incident was more credible. Because of the seriousness of the statement, he met with Guerra to make sure Guerra was 100% positive about the statement. After reconfirming all the facts, Kazemian made the decision the terminate Appellant.

From the the time of the incident until Appellant's termination 65 days passed. When questioned why so long, Kazemian testified he did not hear about the incident until 10 days after it happened. Everybody involved had to conduct the investigation along with other job responsibilities, and the people involved, including Appellant, took time off while the investigation was conducted. Because of this, Appellant was not put on investigatory leave while the investigation continued. And, Kazemian did not believe this would solve the problem. A previous incident where an employee was put on investigatory leave during a disciplinary

investigation resulted in the employee returning to the workplace and shooting the person he had the problem with. Kazemian did not want this to happen again.

Kazemian testified his training from Dr. Nicoletti stressed all threats be taken seriously. He concluded Appellant's statement was not only a threat to Lawrence Mason, but to others as well. Appellant was suspended for one day in 1998 for violence in the workplace. The Agency also has a "zero tolerance" policy regarding violence in the workplace. "Zero tolerance" means, if it is determined there is any violation of the Violence in the Workplace Policy, there will be discipline up to and including dismissal. In this case, because it was determined Appellant had violated the policy, Kazemian had no choice but to impose discipline.

Appellant argued this was not violent behavior, just talk. Therefore, the Agency violated the 1st and 14th Amendments to the U.S. Constitution and Article II, § 25 of the Colorado Constitutions regarding "free speech" and "due process." The United States Supreme Court has held an employer may restrict or regulate their employees' speech in the workplace. Cf. *Connick V. Myers*, 461 U.S. 138 (1983), *Frisby v. Schultz*, 487 U.S. 474 (1988).

Appellant's "due process" rights were not violated because of an insufficient pre-disciplinary hearing. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Appellant offered no testimony and provided no legal authority in support of either of these allegations against the Agency.

A Hearing Officer can only affirm, modify, or reverse the action which gave rise to the appeal. (Fn2) A Hearing Officer has no authority to tell an Agency how to discipline their employees'. Any level of discipline may be used in any given situation as appropriate. CSR § 16-20 2). The type and amount of discipline is the amount believed needed by the appointing authority or designee to correct the situation and achieve the desired performance. CSR § 16-10.

Here Kazemian imposed the only discipline he deemed appropriate to this case. Appellant still does not believe any of his statements were threats. According to the training Kazemian and the Agency received from Dr. Nicoletti, Appellant's statements were threats. Therefore, the Agency's termination of Appellant was just given the circumstances of this case. The action of the Agency is affirmed.

Dated this 27th day of March, 2002

Michael A. Lassota
Hearing Officer
Career Service Board

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