

DECISION AND ORDER

WALTER HULL, Appellant,

v.

DENVER INTERNATIONAL AIRPORT,
and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

Appellant Walter Hull (Appellant) appeals the Denver International Airport's (Agency) November 20, 2018 dismissal of him, for alleged violations of Career Service Rules (CSRs) 16-28 A., F., and G.¹ On April 3 and 5, 2019, Hearing Officer Federico C. Alvarez conducted a hearing to determine the propriety of the discipline. Shelby Felton and Katherine Brown, Assistant City Attorneys, represented the Agency, and Donald Sisson, Esq. and Zachary Wagner, Esq. represented the Appellant. The Agency's exhibits 1 through 11, and Appellant's exhibits A through E were admitted into evidence. The following witnesses testified on behalf of the Agency: Dave LaPorte, Senior Vice President of Airport Operations; John Smithwick, Assistant Director of Security; Rick Graves, Senior Manager of Security; and Nicolette Gonzales, Security Supervisor. Appellant testified on his own behalf.

II. ISSUES

The following issues were presented for appeal, whether:

- A. Appellant violated CSRs 16-28 A., F., and G.; and
- B. the Agency's decision to dismiss Appellant conformed to the purposes of discipline under CSR 16-41, if he violated the aforementioned CSRs.

III. FINDINGS

On May 1, 2006, the City and County of Denver (City) hired Appellant, and he worked as an Operational Supervisor I from April 6, 2008 until his November 30, 2018 dismissal. Generally, Appellant supervised Aviation Security Agents at the Agency's Security Badging Offices.

Appellant supervised one of two badging teams, each team comprised of 6 agents. They provided services, mostly the processing of applications for and issuing security badges for 30,000 people connected to the Agency, for access to its facilities. The teams staffed two offices, the Satellite Badging Office (Office), and the Main Building Office (Main Office) located on the Agency's Concourse A. They rotated offices monthly. Ms. Gonzales supervised the other team. The Office has six desks in a counter area in the main room where agents help customers with the

¹ Appellant had asserted age and disability discrimination claims against the Agency but withdrew them at hearing.

badging process. Appellant's office adjoined this main room in the back. In another adjoining testing room with 30 monitors, to the right of the main area, customers took security tests, which they had to pass before receiving a badge.

During Appellant's alleged misconduct, he was subject to several leadership directives. Relevant goals of his 2018 Performance Standards & Expectations Plan (Ex. 10) included:

Serves as a Subject Matter Expert on the Identity Management System and all related federal rules and regulations that impact the badging operation;

Spends a majority of the shift at the front counter operation work area, providing leadership and support to the badging staff and customers; ...

Resolves problems encountered during daily operations and determines standards for problem resolution including escalations from customers; ...

Trains new and existing employees, and ensures new employees complete all aspects of the training syllabus prior to training completion; and

Ensures employee's [sic] work conforms to policies, standards, and regulations.

On February 22 and 28, and April 18, 20, and 25 of 2018, Mr. Smithwick had met personally with Appellant, and, among other things, reiterated the Agency's directive regarding his presence on the front counter operation work area due to Appellant's noncompliance with it.

Appellant was also subject to other applicable Agency directives regarding Airport Emergency Preparedness, issued during his Hazard Training of 5/17/18 (Ex. E 56):

Before you can properly respond you must first understand the threat. By quickly categorizing the situation, you can make good decisions about what you will do to stay safe. One way of assessing the situation is to quickly determine if it is a **hazard, threat, or imminent threat**. (Ex. E 12).

As soon as you are safe, report the situation to Emergency Services if appropriate. Make sure that you tell dispatchers if you are giving them second hand information! (Ex. E 19).

Regarding Evacuation: Be quick and decisive, but do not run in panic. Panic can injure you or others. As an employee, you will set the tone for others and they will panic if you do. Don't go back for personal belongings, just get to safety.

Remember to take people with you to safety and assist them as you are able!

When you are safe, report the emergency. Remember to tell Emergency Dispatchers if you are not giving them first hand information. If you heard about the emergency from someone else, tell the Dispatcher and put the person who saw it on the phone. (Ex. E 29).

FIRE

- Evacuate the building
- People with reduced mobility should be taken to a stairwell or elevator lobby. Contact Emergency Services with their location at (303) 342-4211
- Each work unit should have a location where all employees should meet to be accounted for. (Sheltering and Evacuating Brochures at Ex. E 47, 49).

On September 20, 2018, another City agency activated a fire alarm in the Office, where Appellant and his team were working. The best evidence for this incident is its video, although it has no audio. (Ex. 4). Visible in the video are two counters that curve away from the camera. Six agents can work at desks in the area between the counters, assisting customers on the outside of

them. Five agents were working there, and Agent Wertz was elsewhere. The counter closest to the camera view has four desks, facing the camera. A chair for customers is located in front of each desk at this counter, with screens behind them, for use in taking customers' photographs. The counter farther from the camera is higher and has two desks, facing away from the camera. Customers receive the badges at this counter and stand due to its height. The agents working here can sit to use their computers or stand to assist customers. Chairs for customers are lined up along the back wall of this area, farthest from the camera view. The Office has two doorways, about ten feet apart along the upper left part of the camera view. A roped aisle in front of them aligns the customers awaiting service. There is a waiting area for customers in front of the right, back wall, with twelve chairs in it. A door to a hallway is immediately behind the waiting area. Appellant's office is to the left of this hallway, with a solid wood door with no windows. Not visible, the testing room adjoins this main area to the right of the camera view.

At 10:50:36,² the alarm appears to have sounded. Three agents turn away from their tasks and look in the same direction for five to six seconds apparently at the source of the alarm. At 10:50:50, in an office across the hall, visible through the Office's glass wall, people begin to exit. The second person to exit, likely an employee, stands outside that office, pointing those exiting outside and waits there until they leave. 12 people exited that office. The last person exited at 10:51:06. At 10:51 a.m., Mr. Wertz came from the testing room, went to Appellant's office, unlocked the door, and spoke to Appellant from the doorway. An agent in the middle of the counter area, who just finished helping a customer, looked all around the Office, made a shrugging gesture, and then focused on Appellant's office. At 10:51:13, Mr. Wertz left Appellant's office, closed its door and returned to the testing room. The customer just served finished packing his briefcase and was the first to leave, at 10:51:25. Next, a second customer sitting at the closer counter stood and left. An agent gestured toward the door to a third customer at his desk and the customer stood but continued speaking to the agent for awhile before leaving. The five agents in the counter area prepared to leave, finalizing entries into computers or gathering documents. One agent gathering documents gestured toward the door to a fourth customer sitting at her desk. He and the three customers standing at the far counter begin to exit next. About this time, Mr. Wertz exited the testing room followed by nine customers. He pointed the first three toward the door and then returned to the testing room. Two more customers who had been sitting in the waiting area, joined those exiting from the testing room and also left. The five other agents from the counters had awaited the exit of the eleven customers and they left next. The two female agents each carried out a bin with Office documents. One more unescorted customer then exited from the testing room, and the Office at 10:52:28 a.m. 19 customers and five agents evacuated.

At 10:52:37, agent Gutierrez reentered the Office through the left door, which he now closed, and began walking around the counter to circle toward Appellant's office. At 10:52:40, Mr. Wertz exited the testing room and walked into the hallway next to Appellant's office. Mr. Gutierrez then reached Appellant's office, pushed its door open, spoke briefly to him and then waited outside the door. Mr. Wertz emerged from the hallway, spoke briefly to Mr. Gutierrez and stood in Appellant's doorway. He spoke to Appellant briefly, entered his office briefly, and then also waited outside the door. At 10:53:23, a female agent, still carrying a bin, reentered the Office through the door farther back, gesturing the other agents toward the door as she walked toward Appellant's office. In response, Mr. Wertz held up his hands in an apparent helpless gesture. At 10:53:29 Appellant arrived at his door and they all began exiting. The male agents walked around the counter toward the camera view and exited out of the left door. The female agent walked backward along the back of the Office toward right door, speaking to Appellant as he followed her. She let him exit and he then held the door for her exit, at 10:54 a.m. (Ex. 4).

² The times cited herein are from the video log in Ex 4.

The people in the office across the hall evacuated that office in 30 seconds. The customers and five agents evacuated the Office in about one minute and 52 seconds. Appellant and the three agents who accompanied him, including the two who returned, evacuated the Office in another one minute and 32 seconds, totaling three minutes and 24 seconds. The agents evacuated the customers in a relatively short time but without coordination or leadership. The agents who left with Appellant seemed to be ensuring his safe evacuation. (Ex 4).

Other evidence established that, from his office when the alarm sounded, Appellant notified Mr. Graves by email that the Office would be closed. After evacuating and upon inquiry when the Fire Department did not arrive, Appellant learned that the alarm was a test. From his office, Appellant notified Mr. Graves that the Office had reopened.

The video also shows that at 11:08:45, an agent opened the Office door to let people return. At 11:09:16, Appellant returned, walked to his office and closed its door. Ten customers returned to the testing room, two customers returned to the waiting area, four customers returned to chairs at the lower counter, and three customers returned and stood in front of the higher counter. The six agents returned to the counter. A queue of from five to seven customers formed to await help. As they were directed to the correct desks and more customers arrived, the queue fluctuated between two to seven customers. Appellant did not help his team restart the operations. After ten minutes, he emerged from his office and relieved Mr. Gutierrez, who apparently took his lunch break. The queue reduced intermittently to one at 11:26, and then no line from 11:33 to 11:37, after which it formed again but at a slower rate. Mr. Gutierrez returned a half hour later when another agent left, and Appellant still worked at the desk. (Ex. 4).

At a September 19, 2018 meeting, Mr. Graves directed the Supervisors, including Appellant, to conduct the weekly inventory, which was performed on Thursdays at the Office, because one of the two Lead Agents had left the Agency. Taking inventory was a 15-minute exercise. Only supervisors and Lead Agents were authorized to conduct it because it involved sensitive material and to keep agents free to service the counter. So, Appellant should have conducted the Office inventory on Thursday, September 20, 2018.

On September 20, 2018, at the end of the day after his team had left work, the Agency, though Mr. Smithwick, suspended Appellant for 14 days, from September 21 through October 4. So, he did not speak to his team members at or during his suspension.

When the former Lead Agent left about two weeks earlier, Appellant had delegated the inventory to Mr. Wertz, who began to conduct it on September 21. On this day, Ms. Gonzales, then assigned to supervise the Main Office, came to the Office to assess its status due to Appellant's suspension. She found Mr. Wertz taking inventory and asked him why he was doing so. Mr. Wertz replied that Appellant had ordered him to do it. Since Mr. Wertz was not authorized to take inventory, Ms. Gonzales discontinued his conduct of it and conducted it herself. In his Response to the Notification of Contemplation of Disciplinary Action, Appellant claimed not to have understood that he personally was to perform the inventory. (Ex. 2). At hearing, he testified that Mr. Smithwick ordered him to perform it personally. He also testified that he routinely delegated tasks to subordinates, without getting permission or being disciplined for it.

Effective June 11, 2018, the Agency ended the practice by its staff of taking paid, scheduled 15-minute breaks. It did so to prioritize customer service and avoid agents taking scheduled breaks when customers were lined up awaiting service. It had determined that the offices had slow periods during the day. So, it now required its staff to take breaks, for less than 15 minutes, when customer volume was low rather than on a schedule. Mr. Graves had directed the Supervisors at meetings on May 21 and 29 and June 18, 2018, to implement the new policy on

breaks. Mr. Smithwick also announced this policy to all the staff at a meeting. Appellant removed the scheduled breaks from the Office schedule but some of his team members continued to take scheduled breaks. Another agent complained to Ms. Gonzales that agent Gutierrez still took scheduled breaks. So, she reviewed the Agency video and saw him take coffee breaks at 9:00 a.m., and she saw him do it personally several times on Concourse A. She advised Appellant of it, so he could address it, but he defended it, claiming that Mr. Gutierrez had a medical issue that required his breaks. Ms. Gonzales subsequently supervised Mr. Gutierrez, who quit taking these breaks and did not claim any medical issue. On September 21, 2018, Mr. Gutierrez's telephone alarm sounded at 9:00 a.m. in a training session. She asked him if he needed to leave, but he declined. In his Response, Appellant stated that he consistently reminded his team to observe the policy but did not mention Mr. Gutierrez.

During 2018, the Agency began preparing for a yet to be implemented transition to Identity Management System (IDMS), a new computer software. It involved the Supervisors in January 2018, when they began discussing the software design with the vendor in telephone conferences. In May 2018, the Supervisors, tasked with becoming IDMS Subject Matter Experts, began testing the software and getting familiar with it, as they then had its standard operating manuals. Mr. Graves directed the Supervisors, including Appellant, in meetings of May 31 and September 7, and other meetings, and via a September 19 email, to teach team members one-on-one to use IDMS. In August 2018, the Agency also had a consultant teach the Supervisors and agents on the use of IDMS. On September 21, 2018, the Agency confirmed that Appellant's team could not perform basic IDMS functions. In his Response, Appellant claimed his ability to conduct on-on-one training of agents was hindered because he could not log into the system, it did not work, its peripherals did not work or worked improperly, and he had been on vacation. Stated otherwise, Appellant could not train himself and become a Subject Matter Expert and thus, could not train his team. Appellant had also delegated this duty to Mr. Wertz and the former Lead Agent.

On October 19, 2018, the Agency provided Appellant a Notification of Contemplation of Disciplinary Action. (Ex. 3). On October 30, 2018, Appellant met with Mr. Smithwick, Mr. Graves, and Janice Hathaway, Senior Human Resources Business Partner for a contemplation of discipline meeting, where he provided his Response to its Notification. (Ex. 2). After considering the totality of the circumstances, on November 20, 2018, the Agency dismissed him. (Ex. 1).

IV. ANALYSIS

A. Jurisdiction and Review

The Career Service Hearing Office has jurisdiction of this direct appeal of a dismissal pursuant to CSR 19-20A.1.a. The Hearing Officer is required to conduct a *de novo* review, meaning to consider all of the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo.App. 1975); CSR 19-55 A.

B. Burden and Standard of Proof

The Agency retains the burden of proof, by a preponderance of the evidence, throughout the case to prove that Appellant violated CSR 16-28 A., F., and G., and to prove that its discipline imposed on him was within a reasonable range of alternatives available to it. CSR 19-55 A.

C. Career Service Rule Violations

1. Appellant's Defenses

Appellant proffered different arguments against the Agency's allegations of his CSR violations. Comprehensively, he argued that the Agency proved no harm from his alleged violations. He argued that his past performance had been satisfactory, and hence, should still be satisfactory. He noted that his less frequent service at the Office counter was ordered by his former supervisor. He argued that he in fact complied with his supervisory duties during the September 20, 2018 fire drill. More specifically, he claimed that his former supervisor assigned him the priority duty during a fire or fire drill to notify his supervisor that the Office would suspend its operations. The Main Office could then answer the telephone calls to the Office. As such, he claimed he committed no violation by staying in his office during the fire drill and notifying his supervisor of the Office closure. With this rationale, Appellant also claimed no violation by first returning to his office after the fire drill and only later assisting at the Office counter.

Appellant also argued that he cannot be held liable for the actions of his team members during his suspension. Stated otherwise, he claimed that had he been present, he would have enforced the Agency policies. Appellant applied this argument to the Agency's allegations that he delegated to an agent the duty to conduct the inventory, allowed his team members to disregard the new policy on breaks, and failed to instruct his team members one-on-one on IDMS. Appellant also claimed he that he could not be disciplined for not training his team on IDMS because he himself was unable to train on it.

Appellant generally did not dispute that he did not follow the Agency's orders as it alleged, but he defended his violations with different excuses. As discussed below, the Hearing Officer generally does not find Appellant's defenses convincing or credible.

2. CSRs.

CSR 16-28 A., states, "Neglect of duty or carelessness in performance of duties and responsibilities." The correct standard to establish neglect of duty is that an employee failed to perform a job duty she knew she was supposed to perform. [In re Serna](#), CSB 39-12, 4 (2/21/14); *citing* [In re Compos, Herrera, Sandler & Sena](#), CSB 56-08, ... 59-08 (6/18/09).

CSR 16-28 F., states, "Failing to comply with the lawful orders of an authorized supervisor or failing to do assigned work which the employee is capable of performing." A violation of the first part of this rule requires proof that a supervisor communicated a reasonable order and the employee violated that order under circumstances demonstrating willfulness. [In re Marez](#), CSA 58-16, 6 (1/26/17), *citing* [In re Macieyovski](#), CSA 28-14, 6 (10/13/14). Misconduct targeted by this rule is different from the mere failure to perform job duties in that knowing disobedience to an order indicates intentional refusal of a supervisor's authority, a more serious offense, than mere neglect. [In re Macieyovski](#), CSA 28-14, 6 (10/13/14).

CSR 16-28 G.1., states, "Failing to meet established standards of performance including either qualitative or quantitative standards. When citing this subsection, a department or agency must describe the specific standard(s) the employee has failed to meet, such as standards in the employee's individual goals or in a Performance Improvement Plan (PIP)." A violation of this rule is established by evidence of (1) an established standard; (2) clear communication of the standard; and (3) employee's failure to meet the standard. [In re Schofield](#), CSA 08-17, 8 (10/9/17), *citing* [In re Rodriguez](#), CSA 12-10, 9-10 (10/22/10).

In Appellant's 2018 Performance Evaluation & Expectations Plan, (Ex. 10), the Agency stated his relevant goals, including,

"Serves as a Subject Matter Expert on the Identity Management System ... Spends a majority of the shift at the front counter operation work area, providing leadership and support ... Resolves problems encountered during daily operations ... Trains new and existing employees ... Ensures employee's [sic] work conforms to policies, standards, and regulations."

3. Appellant's Time at the Counter

Appellant neglected the Agency directive that he spend the majority of his shift at the front counter, providing leadership and support to the badging staff and customers, critically during a September 20, 2018 fire drill. He ignored the front counter and remained in his Office during the evacuation and the reopening of the Office, as evidenced in Ex. 4. This incident regarded his duty to provide more leadership and support time at the counter during the alarm rather than just spending time there. In Appellant's Performance Plan and several counseling sessions, the Agency had reiterated this directive to him, so he was aware of it. Appellant noted that a prior supervisor required him to notify his supervisor of the Office closure, which he did. However, the evidence did not show that the prior supervisor required Appellant to remain in his office during a fire drill or to communicate by email from its computer. On the contrary, his Hazard Training required him to evacuate the Office promptly and ensure or assist the others present to evacuate. This Training also required him to notify the Agency of any incident, but only after evacuating. His compliance with his prior supervisor's directive did not conflict with or overrule this Training. He could have sent emails by his telephone, setup for work use. Appellant's delay, of two minutes, to send an email to his supervisors about the evacuation would have satisfied both his Hazard Training and his prior supervisor's directive.

Appellant's actions during the fire drill were extremely problematic. From his office, Appellant could not assess if a fire was burning in any part of the Office not visible to him on video, or if any colorless heat vapors were spreading in it. Since he was composing an email, he could not effectively assess whether his team or customers needed help, or manage the evacuation. Further, two agents returned to his office to retrieve him, and a third agent also stood by, after evidently confirming all others had left. So, Appellant did not help them, but he exposed them to any potential danger by forcing them to ensure his own safe evacuation.

Appellant testified that he spent five hours, the majority of the time on September 20, 2018 at the counter. He claimed to have begun when he relieved Mr. Gutierrez and remained there until 4:00 p.m. This argument missed the point. He was to devote time there providing leadership, most needed during the fire drill, but which he ignored while cloistered in his office. Up to that point, he had appeared at the counter briefly, and did not claim to have worked it. After the drill, he assisted customers at the counter. While most commendable, his relief of agents while they took lunch cannot be conflated with his leadership responsibility.

Even if given the benefit of the doubt, Appellant exaggerated his claim that he worked at the counter five hours. He staffed the counter at 11:19. His work day was from 7:30 a.m. to 4:00 p.m., with a one-half hour lunch break, which was likely to follow. So, he could have worked the counter for four hours and ten minutes if he remained there the rest of the day, which was unlikely. But if so, it did not overcome his dereliction during the fire drill.

4. Appellant and the Inventory

Appellant immediately violated Mr. Graves' September 19, 2018 order that he conduct the inventory personally. Appellant testified that he did not conduct the 15-minute inventory, scheduled September 20, and that he had previously delegated it to Mr. Wertz. Still he proffered excuses. He claimed to not have understood that he was to conduct it personally. He also testified that the Agency prevented him from stopping Mr. Wertz from conducting it as it suspended him at the end of the day, when Mr. Wertz was gone and beyond communication. Appellant's defenses are not credible. He was to have performed the inventory on September 20, before the Agency suspended him at day's end, which did not affect his work that day. He did not claim insufficient time or ability to conduct it. He ignored it merely because he had delegated it for convenience to Mr. Wertz, unqualified to perform it, and chose not to do it.

Appellant also claimed that Ms. Gonzales recommended that he delegate the inventory to Mr. Wertz, which she denied. He argued that she was undermining him with her testimony in case of future promotions. Appellant believed they alone, the two supervisors beneath Mr. Graves, would compete for his position if he left. His argument is unconvincing. No evidence suggested Mr. Graves would leave in the near future or, if he left, that the Agency would replace him with only either Appellant or Ms. Gonzales. Further, the Agency already seemed to view Ms. Gonzales as more committed to her work than Appellant. It designated her over him as the point person on the IDMS project, despite his greater tenure with it. Thus, Appellant was not Ms. Gonzales' apparent competition for promotion, if any, within the Agency.

Had Ms. Gonzales suggested to Appellant that he groom Mr. Wertz with the conduct of inventory, it still did not provide Appellant with a defense to this allegation. Once Mr. Graves announced the policy change, Appellant was dutybound to implement it and Ms. Gonzales lacked the authority to contradict Mr. Graves.

5. IDMS

Appellant conceded that he did not train his team on IDMS to competence because he himself could not train on it. He argued that he lacked adequate time to train on it because it was dysfunctional and he took some vacation. However, his average of one vacation day monthly was insufficient to prevent him from training on IDMS. Ms. Gonzales took equivalent vacation time and suffered no similar training impediment. The training consultant also reported Appellant was unable to log into the program due to ineptitude and other agents had to "talk him through the process." This incident showed that Appellant had not absorbed the IDMS training for months, not that it did not allow users to log into it. Ms. Gonzales testified that she had tried to get Appellant involved in IDMS early on, but he was not interested. Appellant also delegated the training of the team to Mr. Wertz and the former Lead Agent, which he did not deny in his testimony or his Response. So, he obviously knew that they could learn IDMS to be able to teach others. That IDMS still had "bugs" increased his duty, as Subject matter Expert, to learn it to help eliminate the bugs and facilitate its use. He was capable of training, but chose to largely ignore it and instead made his subordinates train to teach. Appellant cannot justify his failure to become an IDMS Subject Matter Expert and to train his team on it.

6. Unscheduled Breaks

Appellant claims compliance with the policy against scheduled, 15-minute breaks, claiming that he consistently advised his team to observe the policy change. He also claims that he cannot be responsible for his team after his suspension. This policy was likely unpopular since it reduced the length of the breaks, at least, and made their timing unreliable. However, Appellant's team

members did not begin taking scheduled breaks only when the Agency suspended him. Ms. Gonzales had alerted him that Mr. Gutierrez was violating this policy. After receiving a complaint, she confirmed it on the Agency videos.³ Yet Appellant took no action to investigate or end Mr. Gutierrez's violations, and instead defended him with a claim that he had a medical necessity. Appellant did not deny that he told Ms. Gonzales that Mr. Gutierrez needed 9:00 a.m. breaks for medical reasons or that he had no substantiation of it. Yet when Ms. Gonzales later supervised Mr. Gutierrez, he quit taking scheduled breaks and did not claim any medical reason therefor, evidently aware that she would enforce the policy. But Mr. Gutierrez had forgotten to stop his watch's 9:00 a.m. alarm, so it still rang on September 21.

Ms. Gonzales also identified other policy violations by members of Appellant's team, but she did not specifically report them to him. Were he attentive, he could have confirmed these issues since he could view his team via video. Regardless, the Hearing Officer concludes that these other incidents do not support the Agency's claim that Appellant violated this policy. But by disregarding Mr. Gutierrez's violations alone, Appellant violated this policy.

7. Violations

Thus, the Agency proved by a preponderance of the evidence that Appellant violated CSR 16-28 A. neglect of duty; F., failing to comply with the lawful orders; and G.1., failing to meet established standards, through his failure to: (1) provide leadership at the counter, especially during the fire alarm, (2) perform the Office inventory personally, (3) enforce the policy eliminating scheduled breaks, and (4) become a Subject Matter Expert on IDMS and train his team one-on-one on it.

V. DEGREE OF DISCIPLINE

Appellant also argued that, should the Agency prove his violation of the CSRs, it did not warrant his dismissal.

16-41 Purpose of Discipline:

The purpose of discipline is to correct inappropriate behavior or performance, if possible. The type and severity of discipline depends on the gravity of the offense. 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 shall impose the type and amount of discipline he or she believes is needed to correct the situation and achieve the desired behavior or performance.

1. Seriousness of the proven offense

Appellant's misconduct, including dereliction and insubordination, was quite serious. He routinely ignored, and impermissibly delegated some of his duties to others. Further, as a supervisor, he had a higher standard of conduct and should have led by example. That he did not generate specific, significant damage through his misconduct is insufficient to mitigate the fact that his misconduct was flagrant and persistent.

His September 20, 2018 reaction to the fire drill was especially serious because he disregarded what could have been a serious threat to the safety and well-being of the Agency's customers

³ Ms. Gonzales testified that she had no evidence of Mr. Gutierrez's violations, but she persisted with this testimony, so her definition of evidence is unduly narrow.

and staff. He learned that it was a drill and not an actual fire after he evacuated the building. However, before then, he did not help, much less lead, the staff's evacuation of the building. He should have assessed the situation, determined how to best address it, and directed his team accordingly. Instead, he prioritized notifying his supervisor that the Office would be closed. Yet nobody needed that notice immediately, certainly not for the two minutes it took to evacuate. Appellant's actions required two agents to return to a potentially unsafe building to retrieve him. Appellant thereby both disregarded his leadership responsibility and the Agency directives that he lead the Office counter.

Appellant's disregard of the orders that he become an IDMS Subject Matter Expert and teach his team IDMS is equally serious. His team needed to learn it to be prepared to transition to it. Rather than immerse himself in it, Appellant trained minimally and delegated the training of his team to others. He testified that he did not have specific authority to delegate the training of his team, and he did not seek any, likely to avoid scrutiny. His failed leadership on this project curtailed his team's IDMS education of it. And whenever the Agency transitioned to IDMS, his incompetence on it would prevent him from performing his duties.

Appellant's order to Mr. Wertz that he conduct the inventory was a similar problem. Appellant flagrantly violated Mr. Graves' order that he conduct the inventory personally. He also forced Mr. Wertz to violate the Agency policy by requiring him to perform it, for his personal convenience, rather than allow Mr. Wertz more time to serve customers. He testified that the administrative tasks that he had to perform in his office took 30 to 40 percent of his time, likely on average. As such, he had 60 to 70 percent of his work time in which to take a 15-minute inventory. Yet, he blatantly violated Mr. Graves' order, a clear act of dereliction and insubordination.

Appellant also instigated a disruption within the Agency by failing to enforce the new policy on breaks on his team. Other staff noticed the uneven enforcement of the policy. One complained to Ms. Gonzales, who alerted Appellant of his agent's violations. Yet he merely excused the agent, claiming incorrect reasons therefor. Appellant thereby disregarded the limits of his authority as a supervisor. By doing so without permission, he simply violated the policy in an act of insubordination.

2. Prior Record

Appellant's prior discipline includes a September 19, 2018 Suspension Without Pay for neglect of duty, dishonesty, failing to comply with the lawful orders of an authorized supervisor, and failing to meet established standards of performance. (Ex. 6). On May 25, 2018, the Agency issued him a Written Reprimand for neglect of duty, failing to comply with the lawful orders of an authorized supervisor, and failing to meet established standards of performance. (Ex. 9). On August 24, 2016, it issued him a Written Reprimand for punctuality. (Ex. 11). On March 21, 2012, it issued him a Verbal Reprimand for performance management of direct report. On September 1, 2010, it issued him a Verbal Reprimand for failure to complete PEPR by due date.

3. Likelihood of Reform

The record shows that Appellant will not reform. As noted above, the Agency provided him instruction and orders over a period of time, which he continued to ignore, acting unprofessionally.

The Agency changed its operation to try to improve its service to customers. It therefore ordered Appellant to spend more time at the counter leading his team, conduct inventories, become expert with IDMS, and enforce the end of the scheduled, 15-minute breaks. However, Appellant decided he would not implement the changes. He largely ignored the changes or made halfhearted attempts to comply with them. When confronted, he gave lip service to the

criticisms of his noncompliance but then continued it. Why Appellant disregarded orders is unclear, but it does not affect this analysis since his violations are largely undisputed. His lengthy failure to spend the majority of the time at the counter leading his team is an example. Appellant testified that he had to conduct some duties in his office, due to the sensitivity of their material or to computer programs that he could access only there. But he testified that these tasks took 30 to 40 percent of his time, so his failure to do so was inexcusable.

The Agency's May 5, 2018 Written Reprimand of Appellant was based in part on his failure to spend the majority of his time at the counter leading his team, which some agents criticized. Mr. Smithwick had meetings on February 22, 28, and April 18, 2018 with Appellant at which he counseled Appellant to fulfill this duty. At the April meeting, Appellant apologized and agreed to start complying. At their April 20 meeting, Messrs. Smithwick and Graves suggested tips to the Supervisors on how to meet this duty, yet Mr. Smithwick observed Appellant disregarding this directive later that very day. On April 25, they again counseled Appellant, who then spent adequate time at the counter, but limited the tasks that he performed. On April 27, members of Appellant's team complained that Appellant was spending more time on the counter but did so passively or performed only limited tasks, which Mr. Smithwick also observed.

The Agency's September 19, 2018 Suspension of Appellant was based in part on his failure to spend the majority of his time at the counter, and for disregarding his leadership role to support his team members. On June 5 and 18, Mr. Smithwick had reminded Appellant to spend the majority of his time at the counter, proactively addressing issues there. On June 20, his team had to unexpectedly prepare their Main Office area for painting. Mr. Graves was present and saw the team having difficulty with the process. He told Appellant to assist his team, but Appellant proclaimed ignorance of the issue and left his team to resolve it. Next, the Agency had prompted Appellant three times on an upcoming July 13 visit by its CEO to renew her security badge, and it canceled a meeting of that day so he could personally assist her and impress her favorably. Appellant disregarded the CEO upon her arrival and did not assist the agent attending to her, who had problems processing her badge. The CEO, again unassisted, tried three terminals to take the security test, as one was inoperable and another in use. The CEO then had to retake her photo as the agent, not expecting her and unprepared, misfiled her data. Yet Appellant reported to Mr. Smithwick that the CEO had experienced no or minimal problems. He characterized his failure to ensure that the equipment worked, and to assist the agent having problems, as a communication error between himself and his team.

Appellant seemed intent on proving his independence or immunity from his supervisors, by disregarding their orders and his duties. His indifference to the CEO, an obvious priority for Mr. Smithwick, was an example. Besides his failure to confirm the equipment worked and assist the agent, he ignored common courtesy when he failed to acknowledge or welcome her to the Office. Appellant showed through his evaluations that he could do the work, having implemented new projects and trained employees before. At some point, he decided to engage in clear misconduct even after receiving progressive discipline. It reached the point where others routinely reported him. He then rationalized his misconduct with inadequate excuses and took no responsibility for it. Thus, Appellant became incompatible with the Agency in any capacity.

Last, Appellant argued that the Agency dismissed him in violation of the concept of comparative discipline. Mr. LaPorte testified that he applied comparative discipline. However, the Agency had disciplined only two other supervisory employees in a relevant time period, and it dismissed them both. Appellant argues that their misconduct was more egregious. That was so in part, but Appellant's misconduct was more egregious than theirs in that it was flagrant and persistent. So, the evidence regarding the Agency's discipline of other employees was not sufficiently similar to Appellant's to allow any actual comparison of discipline.

VI. CONCLUSION AND ORDER

The Agency's dismissal of Appellant comported with CSR 16-41, as it was properly fashioned to address inappropriate behavior, and was reasonably related to the seriousness of Appellant's conduct; and the record reflected a sufficient, reasonable, and articulated justification for it, it was within the range of alternatives available to a reasonable and prudent administrator, and it was not clearly excessive. See In re Economakos, CSB 28-13A, 2 (3/24/14), *citing* Adkins v. Division of Youth Services, Dept. of Institutions, 720 P.2d 626 (Colo.App. 1986); Colorado Dept. of Human Services v. Maggard, 248 P.3d 708 (Colo. 2011).

Accordingly, the Hearing Officer AFFIRMS the Agency's dismissal of Appellant.

DONE April 12, 2019.



Federico Alvarez
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this final order, in accordance with the requirements and limitations of CSR § 21-20 et seq., within fourteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of delivery, below. See Career Service Rules at www.denvergov.org/csa. All petitions for review must be filed with the:

Career Service Board

c/o OHR Executive Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor Denver, CO 80202
FAX: 720-913-5720
EMAIL: CareerServiceBoardAppeals@denvergov.org

Career Service Hearing Office

201 W. Colfax, Dept. 412, 1st Floor Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND opposing parties or their representatives, if any.