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

Appeal No. 88-09A.

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

MISTY JONES

Appellant,

vs.

DEPARTMENT OF AVIATION, and the City and County of Denver,

Agency/Petitioner.

This matter is before the Career Service Board on the Agency's Petition for Review. The Board has reviewed and considered the full record on appeal and **AFFIRMS** the decision of the Hearing Officer, dated May 11, 2010, on the grounds outlined below.

I. BACKGROUND

Appellant was employed by the Agency as a maintenance technician for approximately ten years. Her employment was terminated by the Agency for sexual misconduct while on duty. The Hearing Officer affirmed the termination under CSR 16-60 D. and 16-60 Y. Appellant did not appeal the Hearing Officer's decision. Instead, the Agency has sought review of the Hearing Officer's finding that the Agency failed to prove a violation of CSR 16-60 Z., conduct prejudicial. Appellant did not take part in this appeal.

II. FINDINGS

CSR 16-60 Z. provides as follows:

> Section 16-60 Discipline and Dismissal
>
> The following may be cause for the discipline or dismissal of a Career Service employee:

Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

In a series of cases decided over the past four years, the career service hearing officers have determined that a violation of this rule requires the agency to prove that the employee's conduct resulted in actual harm to the agency's mission or actual harm to the City's reputation or integrity: *In re Simpleman*, CSA 31-06, p. 10 (10/20/06); *In re Hill*, CSA 14-07, p. 7 (6/8/07); *In re Strasser*, CSA 44-07 p.5 (10/16/07); *In re Catalina*, CSA 35-08, p. 8 (8/22/08); *In re Compos*, CSA 56-08, p. 15 (12/15/08); *In re Norman-Curry*, CSA 28-07 and 50-08, p. 28 (2/27/09); and the current appeal, *In re Misty Jones*, CSA 88-09, p. 6 (5/11/10). In *Strasser*, the Career Service Board affirmed the hearing officers' interpretation of 16-60 Z. as requiring actual injury: "To find otherwise would render CSR 16-60 Z. simply a 'catch-all' provision offering City employees no guidance as to the standards by which their conduct will be measured, while allowing City agencies to impose discipline based solely on subjective views of potential harm." CSB 44-07, pp. 2-3 (2/29/08).

On appeal, the Agency urges us to abandon the requirement of "actual harm" in favor of a new standard in which a city agency would be required only to prove that an employee's conduct created a reasonable expectation of harm. In support of this suggested change, the Agency advances two policy considerations: 1) that the actual harm standard forces a city agency to choose between allowing harm to come to the agency and disciplining the employee for improper conduct, and 2) that the actual harm standard protects wrongdoers from being disciplined. However, we do not find these arguments persuasive, particularly in the case before us.

Here, the Agency took immediate disciplinary action as soon as it learned of Appellant's misconduct. In fact, the promptness of the Agency's action and the severity of the discipline imposed – termination of employment – reinforced its commitment to the highest standards of aviation safety to anyone who might learn of Appellant's misconduct after it occurred. The Agency was not forced to choose between possible harm and imposing discipline, and Appellant certainly was not protected from disciplinary action in the absence of actual harm.

Moreover, while changing the level of proof needed for a violation of 16-60 Z. would have no practical effect in the case before us, we are mindful that such a change could have a far-reaching effect on future career service appeals, and it is within that context that we must weigh the policy considerations that such a change would bring. Although we have carefully considered the Agency's proposal and have discussed it at length during two separate executive sessions, we cannot envision an objective standard by which expected harm could reasonably be measured, when no actual harm occurs. For purposes of career service hearings, a reasonable expectation of harm

would have to be based upon something that is objective, tangible and measurable; otherwise, it would be nothing more than speculation.

For example, expected harm might be reasonable because the agency has experienced prior incidents of misconduct that did in fact result in actual harm. However, if prior misconduct became the measuring rod for determining the reasonableness of expected harm, then a violation of 16-60 Z. would turn not on the employee's conduct, but on whether or not prior misconduct had occurred, whether prior misconduct resulted in actual harm, and whether the prior misconduct was similar enough to the present misconduct to give rise to a reasonable expectation of harm. Such a standard has significant downsides: 1) if there are no prior incidents, the standard is not helpful; 2) if there are prior incidents of misconduct, they would be subject to collateral attack and would expand the scope of career service hearings beyond the employee's own conduct, and 3) such a standard would seem to create a form of comparative discipline at odds with the career service philosophy of imposing discipline based upon the employee's own conduct, rather than the misconduct of others.

On the other hand, if the seriousness of the misconduct is the standard by which the reasonableness of expected harm is measured, then all serious or egregious misconduct would automatically fall within the scope of this rule and seriousness of misconduct would become both the measure of the rule violation and the measure for determining the severity of discipline. And finally, a reasonable expectation of harm, without an objective measurement capable of being articulated, would offer City employees no guidance as to how their conduct will be measured for purposes of disciplinary actions brought under CSR 16-60 Z.

For all these reasons, we decline to adopt the standard urged upon us by the Agency and affirm our prior decision in *Strasser* that CSR 16-60 Z. requires the agency to prove that an employee's conduct resulted in actual harm to the agency's mission, or actual harm to the City's reputation or integrity, and that violations of this rule will have to be decided on a case by case basis.

III. ORDER

IT IS THERFORE ORDERED that the Agency's Petition for Review is **DENIED,** and that portion of the Hearing Officer's Decision of May 11, 2010, finding that the Agency failed to prove a violation of CSR 16-60 Z. is **AFFIRMED.**

SO ORDERED by the Board on September 16, 2010, and documented this 29th day of September, 2010.

BY THE BOARD:

Tom Bonner

Tom Bonner, Co-Chair

Board Members Concurring:

Felicity O'Herron
Nita Henry
Colleen Rea

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **FINANCIAL AND ORDER** on September 29, 2010, in the manner indicated below, to the following:

City Attorney's Officer dlefiling.litigation@denvergov.org

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