

DECISION  
MODIFYING APPELLANT'S 32-DAY SUSPENSION TO A TWO-DAY SUSPENSION

---

IN THE MATTER OF THE APPEAL OF:

**ANASS KHELIK**, Appellant,

vs.

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

---

**I. INTRODUCTION**

The Appellant, Deputy Anass Khelik, appeals his 32-day suspension by the Denver Sheriff's Department (Agency) for alleged violations of specified Career Service Rules, and Agency regulations. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on October 4 and 5, 2012. The Agency was represented by Franklin A. Nachman, Assistant City Attorney. The Appellant was represented by Katharine Jensen, Esq., and Dan Foster, Esq. both of the law firm Foster Graham Milstein and Calisher, LLP. Agency exhibits 1-3 and 7-15 were admitted by pre-hearing stipulation. Appellants' exhibits A. and B. were also admitted by stipulation. The following witnesses testified for the Agency: Deputy Jennifer Langan; Captain John Romero; Captain Silver Gutierrez; Captain Jody Blair; Deputy Manager of Safety Ashley Kilroy; and Captain Deric Wynn. The Appellant testified on his own behalf during his case-in-chief, and presented witnesses Deputy Katherine Presutto and Sergeant Nina Sich. Prior to hearing, the parties stipulated to the following facts.

- A. At all relevant times, Appellant was employed by the Agency with a rank of sergeant.
- B. In March 2011 Appellant was assigned to the Downtown Detention Center (DCC).
- C. In March 2011 Jennifer Langan was employed by the Agency as a deputy sheriff.
- D. On or before February 28, 2011, Appellant supervised Langan.
- E. On March 5, 2011, Appellant met Langan to discuss her performance evaluation (PEPR).<sup>1</sup>
- F. On March 6, 2011, Appellant transferred Langan from her assignment in Pod 3D to Pod 3E.

---

<sup>1</sup> Although the parties stipulated to March 5, 2011 as the date of Langan's work review (PEPR) meeting, evidence at hearing made it clear the actual date of the PEPR meeting was February 28, 2011. [Khelik testimony; Exhibit 9; Exhibit 10; Exhibit 14-2]. The significance of the difference is in the likelihood of a retaliatory motive for Khelik's reassigning Langan. As a general matter, the closer in time between an employee's protected activity (here, Langan's suggestion that she might file a sexual harassment claim) and an adverse act by the Agency (allegedly, Khelik's reassignment of Langan on March 6, 2011), then the more likely it is that there was a retaliatory motive for the Agency's action, see, e.g. Marquez v. Baker Process Inc., 42 Fed. Appx. 272, 275-27L (10<sup>th</sup> Cir 2002), making in more likely the Agency's action would have been materially adverse to a reasonable employee. Argo v. Blue Cross and Blue Shield of Kansas, 452 F. 3d 1193, 1202 (10<sup>th</sup> Cir. 2006).

G The Agency issued a pre-disciplinary letter to Appellant on June 5, 2012.

H. Appellant attended a pre-disciplinary meeting on June 12, 2012.

I. Deputy Manager of Safety Ashley Kilroy issued a 32-day suspension to Appellant July 6, 2012.

## II. ISSUES

The following issues were presented for appeal:

- A. whether the Appellant violated any of the following Career Service Rules: 16-60 L., O., or R;
- B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to suspend him for 32 working days conformed to the purposes of discipline under CSR 16-10.

## III. FINDINGS

The parties' stipulations, above, are incorporated into these findings. The Agency's case rests on allegations that Khelik sexually harassed a subordinate, Deputy Jennifer Langan, then retaliated against her by reassigning her after she threatened to file a harassment claim against him.

The Appellant, Sgt. Anass Khelik has been a uniformed officer of the Denver Sheriff's Department since 2002. His work history has been exemplary with no discipline prior to the current case. He has received many commendations for his work.

Before February 28, 2011, although Khelik was Langan's supervisor, they had a close working relationship in which they engaged in non-work related banter and joking and sought advice from each other. Langan was comfortable enough with Khelik to argue with him in front of other officers, and to put her feet up on the table during her annual work review with him. [Langan cross exam]. They would confide in each other and bring home-made food to share. However, to Langan's consternation, there were persistent rumors of a sexual relationship between her and Khelik, at least some of which was caused and perpetrated by Khelik.

Sometime during the summer of 2010, Khelik joked with Langan, in the presence of other deputy sheriffs, "you shouldn't act that way in your condition." It was evident to all present that Khelik was referring to Langan being pregnant<sup>2</sup> although he did not believe she was. The comment upset Langan, and although Langan laughed at the time of the joke, she told Khelik the comment offended her. [Khelik testimony]. Later the same day, Khelik apologized to her for "crossing the line." Nothing more was made of the incident until the present disciplinary action under review. [Exhibit 5-3 CD interview with Khelik @ 42:55].

During Langan's February 28, 2011 annual work review (PEPR) meeting,<sup>3</sup> Khelik told her "I'm in love with you" or "I'm fucking in love with you," or "I was in love with you." Langan replied she could write a sexual harassment complaint for the comment. Khelik answered "fucking go ahead and write it down." Khelik rated Langan's work for the review period as "exceeds expectations."

Six days later, on March 6, 2011, which was the beginning of a new assignment schedule, Khelik re-assigned Langan and five other deputies (out of 11 deputies assigned to him). None of the deputies knew about the reassignments in advance.

---

<sup>2</sup> Khelik acknowledged "no, I didn't say she was pregnant with my baby, but the innuendo was there." [Exhibit 5-3 CD interview with Khelik @ 43:00].

<sup>3</sup> See note 1.

Langan expressed her concerns to Captains Gutierrez and Romero about Khelik's comments to her, about other past behavior by Khelik toward her, and about her reassignment. Gutierrez had Captain Blair speak to Langan about her concerns, after which an Internal Affairs Bureau (IA) investigation ensued. The investigation revealed that many deputies heard rumors that Khelik and Langan were having an affair, but none observed any behavior that would affirm the rumor. [Exhibit 2-6].

Sometime in March 2011, Langan approached Sgt. Nina Sich, upset and in tears, stating she could no longer work with Khelik. Sich made no notes about the meeting and did not speak with anyone else about it because "it didn't directly affect me."

During his IA interview, Khelik acknowledged he may have used the words "fucking in love with you." [Exhibit 2-7]. He acknowledged Langan said she could file a complaint for his comment. Khelik replied he didn't care. [Exhibit 2-7].

At the end of its investigation, the Agency convened a pre-disciplinary meeting on June 12, 2012. Khelik attended with legal counsel. On July 6, the Agency assessed a 32 day suspension, effective from July 16, 2012 through August 29, 2012. This appeal followed timely on July 17, 2012.

#### **IV. ANALYSIS**

##### **A. Jurisdiction and Review**

Jurisdiction is proper under CSR §19-10 A. 1. b., as the direct appeal of a suspension. In deciding whether the Agency established each alleged rule violation, I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

##### **B. Burden and Standard of Proof**

The Agency retains the burden of persuasion, throughout the case, to prove the Appellant violated one or more cited sections of the Career Service Rules, and to prove its decision to suspend the Appellant for 32 days complied with CSR 16-20. The standard by which the Agency must prove each rule violation is by a preponderance of the evidence.

##### **C. CREDIBILITY**

Since most of the rule violations alleged by the Agency depend on a determination of the relative credibility of Khelik and Langan, that determination follows first. In that regard, the following evidence was persuasive.

###### **1. Khelik credibility**

Khelik's recollection of what he told Langan during her PEPR review on February 28, 2012, evolved significantly. He told IA he "may have" told Langan "I'm fucking in love with you." [Exhibit 5-3 CD interview]. In his pre-disciplinary meeting on June 12, 2012, Khelik admitted saying he was in love with Langan but was referring only to her work. [Exhibit 2-9; Khelik testimony; Khelik cross-exam]. At hearing on October 5, 2012, Khelik explained that in admiring Langan's work during the PEPR meeting, he told her "you know, I was in love with you there for a while" rather than either comment as he related it to IA or at his pre-disciplinary meeting.

Khelik acknowledged he enjoyed a very good working relationship with Langan up to the time she alleged sexual harassment. Moreover, Khelik described Langan as an excellent deputy with whom he enjoyed engaging in banter even during Langan's PEPR review. When Langan accused Khelik of sexual harassment, Khelik at first had no explanation for the accusation.

[Exhibit 5-3 CD interview @ 42:20]. During his testimony at hearing, however, Khelik was certain that Langan accused him of sexual harassment simply because she did not want to be reassigned. In light of the high regard with which Khelik and Langan held each other before and during hearing, this explanation rings false. This evidence raises doubt about Khelik's credibility with respect to the Agency's principal accusations.

## **2. Langan Credibility**

Langan testified at hearing that Khelik never asked her on a date, but Gutierrez testified Langan came to her in tears in March 2011 complaining Khelik continued to ask Langan to date him after she rejected him. [Exhibit 6-25; Exhibit 5-12 CD interview with Gutierrez]. Blair testified with certainty that when she met with Langan on March 13, 2012, Langan told Blair that Khelik asked her out repeatedly even after refusing him. [Blair testimony; Blair cross-exam]. Blair typed an email concerning her conversation with Langan within an hour after it occurred, and she reviewed it before her testimony. Langan offered no rebuttal to the recollection of either Gutierrez or Blair. Conversely, when asked during her IA interview if Khelik ever asked her out on a date, Langan said he did not. [Exhibit 5-1 CD interview with Langan @ 24:30].

When asked by IA if she had suffered any negative conduct or attitudes by any of her peers since Khelik was transferred after the PEPR incident, Langan quickly replied no. [Exhibit 5-1 CD interview with Langan @ 1:20:30]. Incongruously, Langan said at hearing that she has been blackballed since the incident [Langan testimony].

Langan tearfully told IA she denied ever engaging in crude banter with Khelik or any other officer because she was concerned about her ex-husband spreading rumors back to her parents. [Exhibit 5-1 CD interview of Langan]. During cross-examination at hearing, however, Langan was asked if she remembered joking with other deputies about body piercings when she waved a metal-detector wand over her breasts to demonstrate she did not have pierced nipples. Langan did not deny the incident, stating "I can't say it didn't occur." [Langan cross-exam]. In consequence of the evidence above, Langan's credibility is also questionable.

## **D. Career Service Rule Violations alleged by the Agency**

**Career Services Rule 16-60: The following may be cause for discipline or dismissal of a Career Service employee:**

**1. 16-60 L., Failure to observe written departmental or agency regulations, policies or rules. When citing this subsection, a department or agency must cite the specific regulation, policy or rule the employee has violated.**

**Sheriff's Department Order (DO) 300.11.6 Conduct Prejudicial**

**Deputy Sheriffs and employees shall not engage in conduct prejudicial to the good order and effectiveness of the department or conduct that brings disrepute on or compromises the integrity of the City or the Department or conduct unbecoming which:**

**(a) May or may not specifically be set forth in Department rules and regulations or the Operations Manual; or**

**(b) Causes harm greater than would reasonably be expected to result, regardless of whether the misconduct is specifically set forth in Department rules and regulations or the Operations Manual.**

Deputy Manager Kilroy testified DO 300.11.6 has a broader application than CSR 16-60 Z. She found Khelik violated this Agency order by spreading rumors about Langan, and by telling Langan he loved her. None of these claims indicates actual harm to the Agency or to the City.

The language of DO 300.11.6 and CSR 16-60 Z. is nearly identical. DO 300.11.6 at (b), and CSR 16-60 Z., reinforce the reading of both rules as requiring proof of harm to the agency or the City. For these reasons, I decline to distinguish the application of this Agency rule and the cited subsections from CSR 16-60 Z. Since no actual harm to either the Agency or to the City was shown by the Agency's evidence, no violation is proven under this Agency rule.

### **DO 300.21.1 Discrimination, Harassment, and Retaliation**

**Deputy Sheriffs and employees are prohibited from engaging in any form of discrimination, harassment, including sexual harassment, or retaliation based on any class or personal characteristic protected by federal, state, or local law; or as delineated by Mayor's Executive Orders, CSA rules, Manager of Safety policies or Departmental orders.**

The Agency's evidence that Khelik discriminated and harassed Langan under this order was the same as for its claims of discrimination and harassment under CSR 16-60 R., below. [Kilroy testimony]. The same discussion and conclusions, below, apply here as well.

#### **Retaliation under DO 300.21.1**

The federal test to establish a retaliation claim is that an agency engaged in a materially adverse action, meaning, in the present context, an Agency action which is likely to deter a reasonable employee from making or supporting a claim of harassment. See Burlington Northern & Santa Fe Ry. v. White, 126 S. Ct. 2405 (2006).

Shortly after the PEPR meeting in which Langan told Khelik she could report his "in love with you" comment as harassment, the Agency claimed Khelik retaliated by reassigning Langan to a less-desirable post. The Agency's proof of Khelik's retaliatory motive was twofold. First, Khelik told Captain Romero he transferred Lagan because she was unfit for her then-current assignment [Exhibit 2-4; Romero testimony], incongruously Khelik told Blair and told IA that he transferred Lagan for operational reasons. The second basis for the Agency's retaliation claim was that the position to which Khelik transferred Langan was less desirable.

Khelik denied telling Romero he transferred Langan because she was unfit and countered that he had valid business-related reasons to reassign Langan including that: it was the start of a new assignment schedule; many deputies' assignments were stale because they had been assigned to the same post for 8-9 months; deputies needed to cross-train in different areas; and no assignment belongs to any individual. The Agency failed to prove Khelik's transfer of Langan was retaliatory for the following reasons.

1. Khelik transferred not only Langan but five other deputies simultaneously.
2. Langan complained Khelik gave her no notice of the reassignment, but Khelik gave no advanced notice of the transfer to any of transferred deputies. Both 1. and 2. indicate he did not single out Langan.
3. Khelik had inherited the supervision of Langan and 10 other deputies only since the beginning of January 2012, so his explanation that he simply continued the current assignments until the next assignment period at which time he transferred Langan and five others, is a reasonable work-related explanation.
4. Langan suffered no reduction in pay or benefits by the transfer.<sup>4</sup>
5. No other deputy found the position to which Khelik transferred Langan was less

---

<sup>4</sup> While this factor was integral to the old test for retaliation, it remains one factor in the present test: whether a reasonable employee would have been dissuaded from filing a complaint due to the transfer).

desirable than Langan's former assignment. Presutto worked both posts and found neither to be entry level or lower status than the other. [Presutto testimony]. Langan admitted the assignment to which she was transferred was not considered to be more entry level than her previous assignment. [Langan testimony]. Gutierrez found Khelik's transfer of Langan "curious," [Gutierrez testimony], but that is an insufficient basis to establish a retaliatory motive. Moreover Gutierrez affirmed that sergeants have the authority and responsibility to move deputies in order to ensure they are cross-trained. [*Id.*]. That sentiment was echoed by Romero, Blair and even Langan herself. [Langan cross-exam; Romero testimony; Romero cross-examination; Gutierrez cross-exam; Blair testimony].

6. No deputy has a right to any particular assignment. For example, Sich testified she rotates deputies daily in order to avoid such sense of entitlement and in order to ensure they are cross-trained. [Sich testimony].

7. The Agency's principal proof for Khelik's retaliatory motive – Romero's recollection that Khelik told him he transferred Langan because she was unfit for that duty - were rebutted by the Appellant. First Blair testified with certainty that Khelik explained to her the reason for Langan's transfer was for cross-training and to avoid staleness. Blair took contemporaneous notes of the conversation. Romero did not recall when he spoke with Khelik about Langan's transfer, and took no notes of the meeting. Therefore, Blair's contemporaneous recollection must be a weighed more heavily than that of Romero.

8. For reasons stated immediately above, Kilroy's determination that Langan's new assignment was less desirable, therefore retaliatory, was not supported by the evidence at hearing. Thus the Agency failed to prove the reassignment was either subjectively or objectively adverse. [In re Gallo, CSB 64-09A., 4 (3/17/11)]. Having disposed of retaliation under the federal test, I turn to the remaining bases to establish retaliation.

In addition to federal law, DO 300.21.1 incorporates the Career Service Rules into its definitions of retaliation. CSR 15-21 prohibits a supervisor from administering an adverse action against an employee who participates or brings a complaint to the Denver Board of Ethics. No evidence was adduced at hearing to indicate Langan brought a claim to the Ethics Board. If she had, the discussion above makes clear that her reassignment was not an adverse action.

CSR 15-101, prohibits all forms of harassment which it defines to include retaliation for reporting or threatening to report harassment. [CSR 15-102 E.]. For reasons stated above, the Agency failed to prove Khelik motive to reassign Langan was retaliatory.

The Agency did not cite any other basis upon which it found Khelik retaliated against Langan, and no other basis is apparent from the evidence. The Agency failed to establish its retaliation claim under DO 300.21.1.

#### **DO 1100.4 Relationships with Other Employees**

**Supervisors and administrators shall limit their on-duty actions and relations with other employees to those actions prescribed by their duties and procedures or actions considered reasonable and appropriate the work situation.**

The Agency alleged Khelik violated this rule by telling Langan he loved her, by spreading false rumors about Langan being pregnant with his child, by admitting he may have looked in her windows at home, and by asking her repeatedly for dates. [Kilroy testimony]. Khelik replied his "I'm in love with you" comment related only to Langan's work, that Langan fully participated in crude banter, that he apologized almost immediately for his pregnancy joke, and that he never looked in her window or asked her for a date.

First, regardless of intent, a supervisor telling a subordinate he is in love with her is a failure to limit his on-duty actions to those prescribed by his duties, and was inappropriate to the work setting in violation of this rule. Khelik's representation - that when he said "I'm in love with you," or "I was in love with you," or "I'm fucking in love with you" he referred only to Langan's work - is inherently implausible, and constitutes a violation of this rule.

As a supervisor, Khelik's conduct is subject to a higher standard of review. His comment inferring Langan, a subordinate, was pregnant with his child was unreasonable and inappropriate to the work setting, particularly as it furthered already-existing rumors about them. Khelik acknowledged the comment was upsetting to Langan, further supporting the conclusion that it was inappropriate.

Whether Khelik peered in Langan's windows at her home was unproven, as neither Langan nor Khelik was more credible than the other. Other than Langan's word against that of Khelik, there was no evidence from which the Agency could prove this allegation.

## **DO 2420.1B SEXUAL HARASSMENT**

**1. Purpose:** To prescribe a code of conduct for all Denver Sheriff Department (DSD) personnel regarding interpersonal relations between employees. Furthermore, it establishes procedures for the investigation and review of complaints and specifically cites examples of unacceptable behavior.

**2. Policy:** The Denver Sheriff Department (DSD) asserts zero tolerance and strictly prohibits harassment in and outside of the workplace. This includes any type of harassment, sexual or otherwise, towards inmates, fellow employees or others in our community. All DSD employees, including supervisors and administrators, are expected to refrain from engaging in any behavior and/or conduct defined as harassment/sexual harassment.

Violations of harassment/sexual harassment are subject to administrative discipline, up to and including dismissal, as well as any criminal charges associated with the violation of local, state and federal laws.

### **4. Definitions:**

**A. The Denver Career Service Authority (CSA) Rules and Regulations, Section 15-100 define sexual harassment as any unwelcome sexual advances, requests for sexual favors or other verbal or physical contact of a sexual nature when:**

- 1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or**
- 2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or**
- 3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive environment.**

### **5. Examples (not inclusive of all types of harassment)**

- A. Unwelcome sex oriented verbal "kidding."**
- B. Unwelcome "teasing" or jokes.**
- C. Subtle pressure for sexual activity.**

**H. The abuse of authority by a law enforcement officer in relation to harassment sexual or otherwise.**

**I. Unwelcome repeated requests for dates.**

**J. Employees joking or engaging in behavior that could be observed as offensive by a third party.**

[Exhibit 8].

Agency rules governing harassment prohibit a broader range of behaviors than the proscriptions contained in Title VII. [42 U.S.C. 2000e et seq.(1964)]. The extensive definitions and examples under this order make clear that under Agency orders (as well as Career Service Rules), an employee does not have to prove, unlike a Title VII claim, that harassing conduct became severe and pervasive enough to alter the terms and conditions of employment to create a hostile work environment before reporting such harassment. In re Gallo, CSB 63-09 A., 5 (3/17/11). The Agency found Khelik violated this rule based on the followed alleged incidents:

1. In love with you. During her PEPR review, when Langan asked Khelik why he was grouchy, [Exhibit 5-3 CD @ 28:35], he replied "because I'm fucking in love with you and I realized that it's one sided." Khelik acknowledged he may have said "I'm fucking in love with you," [Exhibit 2-9; Exhibit 5-3 CD @ 31:07; 31:22 ("I could very well have said that; I don't recall")], but denied saying "and I realized that it's one sided." Khelik claimed his comment was in the context of, and referred to, Langan's work performance, and was not sexual. He explained he felt she was a "superstar worker," and claimed he used the word "love" with other subordinates to describe their work performance.

Khelik's explanation is not credible. Khelik did not couch the statement in terms of Langan's work such as "you're doing a great job, and I love you for that." Khelik's explanation does not fit the context of the conversation, and the statement is inherently unnerving in the context of a work review between a male supervisor and female subordinate. Even if Khelik's explanation were credible, the statement was inappropriate in an official work review, regardless of personal relationships. Khelik's further explanation that he and Langan were joking and bantering during the work review only buttresses Khelik's inappropriate behavior in the context of an official work review. Langan testified she was embarrassed by the comment. Moreover, Khelik produced no testimony from any other deputy with whom he allegedly used the word "love" to describe his or her work. In addition, he acknowledged he did not use the word "love" in the context of a work review with any other deputy. [Khelik cross-exam]. Khelik's harassment of Langan by saying he was in love with her during a PEPR review is established.

2. Repeated requests for dates. Khelik asked Langan out on a date repeatedly even after she refused. Khelik denied ever asking Langan for a date or to engage in any social activity outside work. [Exhibit 2-7, 2-8; Khelik testimony]. The Agency's principal evidence for this allegation was Captain Romero's recollection that Langan complained Khelik transferred her because she refused to date him. However Langan testified at hearing that Khelik never asked her on a date, [Langan testimony]. Captain Blair, whose credibility was unchallenged and, unlike Romero, made detailed, contemporaneous notes of her meeting with Langan. Her fastidious recoding added significant weight to the accuracy of her recollection. The preponderant evidence weighs against the Agency's claim that Khelik sexually harassed Langan by repeatedly asking her for unwelcomed dates.

3. Pregnancy joke. Khelik joked about and perpetrated rumors about Langan having his baby to other deputies. He acknowledged Langan was offended by his comments, and stated he apologized to her shortly afterward. [Exhibit 5-3 CD; Khelik testimony]. Langan affirmed she told Khelik his humor was offensive. She said she did not recall Khelik apologizing for the joke.

Khelik's acknowledged joking about Langan being pregnant with his child, in the presence of other deputies was an evident violation of D.O. 2420.1B 5. A., Unwelcome sex oriented verbal "kidding," 2420.1B 5.B., Unwelcome teasing or jokes, and 2420.1B. 5. J., Employees joking or engaging in behavior that could be observed as offensive by a third party.

4 Peeping Tom. Khelik peered through Langan's windows at her home. [Langan cross-exam]. Khelik denied having ever done so and denied joking about it as Langan alleged. There was no independent evidence regarding the subject. Neither party is more credible on this point than the other, therefore, without other evidence, the claim remains unproven.

5. Surveillance camera. Khelik viewed Langan on closed circuit monitors at work to leer at her. [Exhibit 2-7, 2-8]. Khelik replied he observed Langan on the monitors just as he observed all deputies in his charge - in order to correct improper behavior, and not for any untoward reason. [*Id.*; 2-9.] Other officers affirmed such a practice was not unusual for sergeants. [Exhibit 5-5, CD interview with Dep. Blue; Exhibit 6-16 through 6-18; 6-22 (Gettler interview); 6-26 (Gutierrez interview); 6-36 (Dep. Crews interview); 6-40, 41 (Sgt. Sich interview)]. This Agency claim remains unproven.

6. Ride home. Langan drove Khelik home when he had car trouble. The following day Khelik told other deputies that Langan drove him home. One responded "again?" which caused much laughter to the others but consternation to Langan. Khelik's sharing the fact that Langan gave him a ride home was not harassing. Even though the ride became a topic of perceived derision to Langan, the derision cannot be attributed to Khelik. Khelik was certainly in a position to quash the joke when it became apparent it was offensive, but that neglect does not apply under this rule. This Agency claim failed to establish a violation under D.O. 2420.1B.

## **2. CSR 16-60 O. Failure to maintain satisfactory working relationships with co-workers, other City employees, or the public.**

Langan reported she could no longer work with Khelik after the PEPR incident. Even though Langan's credibility was somewhat in doubt, there was no doubt her working relationship with Khelik was close before the PEPR meeting and suffered in the aftermath of it. Sich affirmed Langan's sentiments, and Gutierrez agreed there was cause to separate them. For those reasons, the Agency established Khelik violated CSR 16-60 O. by a preponderance of the evidence.

Kilroy also cited Khelik's "not in your condition" joke as a basis to find he violated CSR 16-60 O. Regardless whether Khelik apologized for the joke, Langan's working relationship with Khelik did not appear to be affected beyond that day, as Langan continued to enjoy a close relationship with Khelik until her PEP review in 2012. [See Findings, above]. Since the Agency failed to show Langan's working relationship with Khelik was substantially affected by Khelik's unwarranted joke, no violation was established by this incident. This rule is not intended to punish every slight in the workplace, but only those with an enduring effect on a working relationship.

## **3. CSR 16-60 R. Discrimination or harassment of any employee or officer of the City because of ... gender ... This includes making derogatory statements based on ... gender. Discipline for this prohibited conduct does not have to rise to the level of a violation of any relevant state or federal law before an employee may be disciplined ....**

A prima facie case for intentional discrimination is established by an employee presenting some evidence of 1) membership in a protected class, 2) an adverse employment action, and 3) an inference connecting the adverse action to the protected class. In re Johnson, CSA 135-05, 3 (3/10/06).

The Agency failed to prove Langan's reassignment was an adverse action. Only Langan found her reassignment to be adverse. Other deputies credibly testified the post to which Khelik reassigned Langan was no less favorable than her prior post, and Langan suffered no reduction in pay or benefits by the reassignment. No discrimination is established.

With respect to the harassment portion of this rule, Kilroy testified Khelik's behavior toward Langan was harassing in violation of Agency rules 300.21, 2420.1B. and CSR 16-60 R. Khelik acknowledged his teasing Langan about being pregnant bothered her, but he apologized as soon as she told him. While Agency rules 300, 21 and 2420. 1B. extend traditional notions of harassing conduct, this rule does not, and I decline to do so here in regard to Khelik's pregnant joke.

The other Agency claim under this rule was Khelik's acknowledged statement "I'm fucking in love with you" to Langan during her PEPR review. Khelik failed to prove his comment referred to Langan's work. In the context of a work-related meeting between superior and subordinate, the supervisor's unexpected and unwelcomed utterance of love for the subordinate are inherently harassing under CSR 16-60 R.

## **V. DEGREE OF DISCIPLINE**

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-20 to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20.

### **A. Severity of the proven violations**

The Agency assessed discipline against Khelik based upon its recently-implemented disciplinary matrix. [Exhibit 15]. The matrix is intended as an aid to assess discipline for various violations in an objective and consistent manner, while giving consideration to aggravating and mitigating factors.

As the decision maker, Kilroy testified that Khelik's improper behavior fell into two general categories: harassment and retaliation. She found no aggravating or mitigating factors which should offset the assessment of a penalty at the presumptive level for those violations in the matrix, and that the penalty for each category should be assessed once in each category rather than "stacking" the penalty for multiple violations within each category. Consequently Kilroy decided to assess a single two-day suspension for all of Khelik's violations related to harassment, plus a 30-day suspension for retaliation, for a total of a 32-day suspension. [Kilroy testimony].

Hearing officers must give substantial deference to an agency's choice of the level of discipline, and must not disturb the agency's determination of the severity of discipline unless it is clearly excessive. City and County of Denver v. Weeks, 10CA1408, p.20 (Colo. App. 2011).

Khelik's pregnancy joke about Langan, by itself, was offensive but not egregious; but Khelik's ill-timed humor was aggravated by the presence of other officers, so that Kilroy's finding that this violation fell into the presumptive range of a 2-day suspension was reasonable

The Agency considered Khelik's most serious violation was his retaliation against Langan. Based on that determination, the Agency assessed a 30-day suspension to be served consecutively to the two-day suspension for harassment. However, retaliation was not proven by a preponderance of the evidence.

## B. Past record

The Agency agreed Khelik's past disciplinary record was unblemished and that his work history was replete with above average reviews and commendations. Kilroy considered Khelik's record, but decided not to reduce the presumptive penalty due to the seriousness of the violations. In assessing discipline, where an appellant's positive work history is trumped by an egregious violation, but the egregious violation is not sustained at hearing, then in reassessing the degree of discipline, the appellant's positive record must be accorded its due weight.

## C. Penalty most likely to achieve compliance with the Rules.

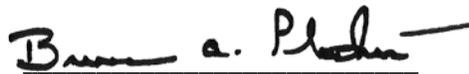
The Agency failed to establish that Khelik would not be able or willing to comply with the Rules he violated if a lesser discipline were assessed. Khelik testified he understood the consequences of joking around with subordinates and had already made changes in that regard. [Khelik testimony]. The Agency did not rebut that assertion. The only established basis for harassment was Khelik's improper joke, and Khelik stated he immediately apologized for "crossing the line."

The most egregious violation alleged by the Agency, retaliation, was not proven. Khelik's past record is unblemished, and he appears to be capable of sincere and lasting reform to comply with those Agency and Career Service Rules he was proven to have breached. The Agency found a two-day suspension was the proper penalty for the only proven violations, and I find that decision was not clearly excessive. [Weeks, supra].

## VI. ORDERS

1. The Agency's 32-day suspension is MODIFIED to a two-day suspension.
2. The Agency is ordered to pay the appropriate amount of back pay and other benefits under Career Service Rules, no later than two pay periods after the date of this decision.
3. If there is a dispute about back pay or benefits, the Agency is ordered pay the undisputed amount, and to reinstate undisputed back benefits no later than two pay periods after the date of this decision. The proper remedy for the unresolved portion of back pay and/or benefits is a motion to set the matter for hearing in the Hearing Office. [In re Mestas, CSB 64-07, 61-07, 62-07, 67-07 (8/12/08)].

DONE November 19, 2012.



Bruce A. Plotkin  
Career Service Hearing Officer