**CAREER SERVICE BOARD,**
**CITY AND COUNTY OF DENVER, STATE OF COLORADO**
Appeal No. 10-14A

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## DECISION AND ORDER

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IN THE MATTER OF THE APPEAL OF:

**JENNIFER LACOMBE,**

Appellant-Respondent,

v.

**DEPARTMENT OF AVIATION, BUSINESS MANAGEMENT SERVICES**

**and the City and County of Denver, a municipal corporation,**

Agency-Petitioner.

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The Agency dismissed Respondent Jennifer Lacombe from her employment for disobeying an order to not take home food which had been left over from a conference. She appealed her dismissal to a Hearing Officer. The Hearing Officer found Respondent did disobey an order to not take home the leftover food, but modified the imposed penalty of discharge to a thirty-day suspension. The Agency has appealed that ruling, asking us to re-impose the discharge of Respondent. We decline to do so.

Respondent does not contest the finding that she did, in fact, commit violations of Career Service Rules. The only issue before us is whether the Hearing Officer erred in reducing the originally imposed discipline of discharge. In support of its Petition for Review, the Agency makes two arguments; first, that the Hearing Officer erred in interpreting CSR 16-20; and second, that the Hearing Officer's decision sets improper precedent in that it improperly substitutes the Hearing Officer's judgment for that of the Agency and further, that it deprecates the seriousness of Respondent's misconduct.

CSR 16-20 states:

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.

Our review of the Hearing Officer's decision reveals no facial misinterpretation of this Rule. We see plainly in the decision where the Hearing Officer analyzed the issue of Respondent's ability to correct her behavior. He found she could. The Hearing Officer performed a thorough analysis of the type and severity of the offense. He concluded that the proven misconduct required imposition of a minor penalty for *de minimus* acts. The Hearing Officer took into account Respondent's past record, which, he noted, did not even exist until moments before these charges were brought.

The Agency argues, however, that the Hearing Officer misinterpreted this Rule by engaging in comparative discipline. If, in fact, the Hearing Officer had imposed comparative discipline restraints on the Agency's disciplinary determination, that would amount to an improper interpretation, or at least an improper implementation of CSR 16-20. But we do not believe the Hearing Officer utilized comparative discipline, at least as we understand that term, in reaching his decision.

It would, perhaps, be beneficial to explain what we believe to constitute a comparative discipline system. It is commonly understood within the City and County of Denver that the discipline system employed by Denver's Civil Service Commission, when overseeing the discipline of Denver Firefighters and Police Officers, is a comparative discipline system. This concept was, evidently, a creation of the Denver City Charter, specifically, Charter Section 9.4.15(F) which states:

> ...Review of a Hearing Officer decision by the Commission shall be limited to the following grounds: (a) new and material evidence is available that was not available when the appeal was heard by the Hearing Officer, (b) the decision of the Hearing Officer involves an erroneous interpretation of departmental or civil service rules, (c) the decision of the Hearing Officer involves policy considerations that may have effect beyond the case at hand, or ***(d) the discipline affirmed or imposed by the Hearing Officer is inconsistent with discipline received by other members of the department under similar circumstances.*** ...

Under this system, the Civil Service Commission could reverse or modify a disciplinary decision if the officer or firefighter was able to prove that a different employee, in the past, under circumstances sufficiently similar to his own, received a different (presumably lighter) discipline. In essence, the system, by force of history, created narrow ranges of discipline which bound the disciplinary decision-maker well into the future. Hypothetically, if an officer received a thirty day suspension for use of excessive force in the year 2000, the Manager of Safety could not issue discipline in excess of thirty days for a similar use of excessive force today. This is

not our system, and it is certainly not the disciplinary consideration made by the Hearing Officer in this case.

The fact that the Hearing Officer, in his decision, cited cases from the federal discipline system, does not lead us to conclude that he engaged in a comparative discipline analysis. Rather, what we believe he was doing was simply giving support to his belief that the discipline administered by the Agency, under the record presented to him, was not within the range of alternatives available to a reasonable and prudent administrator. By citing the cases, the Hearing Officer did nothing more than demonstrate that other judicial and quasi-judicial officers agreed, in principal, with the philosophical underpinnings of his own assessment of this case.

The Agency next advances two arguments in support of its claim that the Hearing Officer's decision sets poor policy precedent. The Agency argues that the Hearing Officer improperly substituted his judgment for that of the disciplinary decision-makers and that in reducing the discipline the Hearing Officer downplayed the seriousness of Respondent's offenses. We reject both of these assertions.

First, while it is true the Hearing Officer should not substitute his judgment for that of the Agency decision-makers, this only holds true when those Agency decisions are within the range of alternatives available to a reasonable and prudent administrator. It only holds true if those decisions are not arbitrary or capricious. In this case, the Hearing Officer found that the disciplinary decision was both unreasonable and arbitrary or capricious, and we believe these conclusions to be reasonable based on the record as a whole. Under these circumstances, the Hearing Officer was compelled to re-assess the discipline, which, by definition, would mean the substitution of his judgment for that of the (poorly exercised) judgment of the Agency.

In addition, we do not believe the Hearing Officer's decision sets a poor precedent. The decision did not deprecate the seriousness of the offenses committed by Respondent. Rather, the Hearing Officer determined that the offenses were not serious at all, that they were *de minimus*. He also determined that Respondent had learned her lesson, expressed contrition and would likely not engage in any similar misconduct in the future; warranting a significantly lesser punishment than imposed by the Agency, in conformance with our principles of progressive discipline. Again, we believe all of these conclusions are reasonable based on the record.

Of significant concern to us, however, is the Hearing Officer's conclusion, also supported by the record, concerning the Agency's last-second attempt to "pile on" discipline so that it could argue (as it did) in support of it decision to discharge Respondent, that she had a history of discipline. We believe this action underscores, overall, the weakness of the Agency's position. This piling-on of additional discipline for conduct, some of which occurred five months prior, (which, in the eyes of the Agency was serious enough to warrant merely a written reprimand) appears to us to be a tacit admission by the Agency that it's case for discharge against Respondent was exceedingly weak, and that it needed bolstering which would come in the form of "prior" discipline. We will not tolerate, and hope to discourage such gamesmanship.

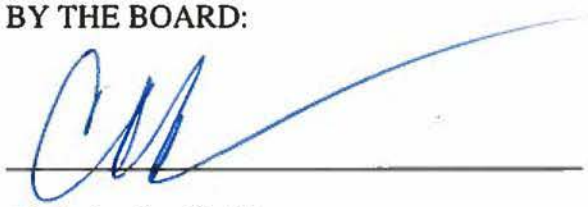
Because we believe the rules violations proven in this case were truly *de minimus*, and because it appears to us that the Agency engaged in tactics designed to artificially bolster a claim

of past poor performance on the part of Respondent in an effort to justify its poorly conceived decision to terminate her, we affirm the Hearing Officer's decision in all respect but one.

We exercise our discretion and MODIFY the Hearing Officer's penalty assessment. We vacate the Hearing Officer's issuance of a thirty-day suspension to Respondent and hereby modify the imposed penalty to a WRITTEN REPRIMAND. The Agency shall make Respondent whole for any wages and benefits lost as a result of the issuance of any prior discipline associated with this appeal.

SO ORDERED by the Board on May 21, 2015, and documented this 16th day of July, 2015.

BY THE BOARD:



Chair (or Co-Chair)

Board Members Concurring:

Patti Klinge

Derrick Fuller

Neil Peck, Esq.