DECISION AND ORDER

THE MATTER OF THE APPEAL OF:

VICTORIA LINDSAY, Appellant,

vs.

OFFICE OF ECONOMIC DEVELOPMENT,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on Nov. 10, 2014 and Jan. 6, 2015 before Hearing Officer Valerie McNaughton. Appellant was present and was represented by Vernon Howard. Assistant City Attorney John Sauer represented the Agency. The Agency called Victoria Lindsay, Sam Abraham, Mohammed Eftekhari, Nicole Edwards, and Chiquita McGowln. Appellant testified on her own behalf and presented the testimony of Darlene Dominguez-Trujillo and Ranae Taylor.

I. STATEMENT OF THE APPEAL

Victoria Lindsay appealed her three-day suspension dated Sept. 9, 2014. Appellant also filed claims of retaliation and discrimination on the bases of race, color, sex and age. At hearing, Agency Exhibits 1 - 4, 6 and 7 were admitted. Appellant's Exhibits A, B, D - F, and L - O were also received into evidence.

II. FINDINGS OF FACT

Appellant Victoria Lindsay has been a Contract Administrator with the Office of Economic Development since 2002. Her duties include negotiating and drafting contracts and use agreements for the city's procurement of goods and services. On Sept. 9, 2014, she was suspended for three days for four incidents involving inappropriate behavior toward a co-worker. (Exh. 2.)

The disciplinary letter alleges that Appellant shouted at Contract Administrator Sam Abraham on June 20, 2014. Specifically, after Abraham repeatedly went to Appellant's cubicle and asked questions about a contract processed by Appellant, Appellant stated abruptly, "For the third time, I don't know!" (Appellant, 3:45 pm.) Three days later, Appellant emailed Abraham apologizing for her outburst and seeking a truce. The email contained a cartoon of Looney Tunes rooster Foghorn Leghorn with the caption, "Boy, I say boy, you're about to exceed the limitations of my medication." (Exh. A.) When he did not respond, Appellant went to Abraham's cubicle and demanded an answer. Abraham was still upset and did not reply. Appellant walked away with the words, "I guess the answer is no."
On June 27, Abraham opened one of Appellant's contracts to use a guide in his preparation of another reimbursement contract. He then went to a meeting without closing the document, thereby placing it in "read only" format while he was gone. In the meantime, Appellant tried opening it to make last-minute changes for a meeting. A pop-up message stated that the document was locked for editing by Abraham. Appellant had never seen this type of message before, and was unaware that she could still edit her contract if she saved it under a different name. Appellant went to the meeting with her unedited draft. During that meeting, her supervisor Nicole Edwards pointed out parts of the contract that needed changes. Appellant felt that the unfinished state of her document reflected negatively on her performance.

After the meeting, Appellant sent Abraham an email accusing him of intentionally hindering her ability to do her job, and of copying her work instead of doing his own. (Exh. B.) "I believed he did it on purpose. The email just stated the facts." (Appellant, 1/6/15, 11 :35 am.) When Abraham read the first sentence, he was prepared to apologize for leaving the contract open. After reading the entire email, he thought, "okay, this is too much", and concluded that Appellant's mistreatment of him was "not going to stop". (Abraham, 10:49, 11:29 am.) Abraham sent a copy of the email to their supervisor Nicole Edwards to show "the kind of harassment I am being exposed to." (Exh. 6-1.)

Edwards met with Abraham immediately. He told Edwards that he didn't mean to leave the document locked, but felt that Appellant's angry email was part of her ongoing efforts to humiliate him. Abraham informed Edwards that Appellant had been bullying him for a long time, and apologized for not reporting it before that date. When Edwards asked what could be done to make him feel more comfortable, Abraham replied that he would like to be moved to a cubicle farther away from Appellant. Edwards agreed that the tone of Appellant's email was very defensive. (Edwards, 1:14 pm.)

Next, Edwards informed Contracts Manager Mohammed Eftekhari about Abraham's complaint. Eftekhari decided to invite Abraham to take a walk with him so they could talk. Abraham told him he was very upset by communications from Appellant that he considered harassing. He reported that he was hurt and distracted by the situation, which had been going on for a long time. Abraham blamed himself for tolerating without protest Appellant's mistreatment of him. (Eftekhari, 11:31 pm.)

At this time, Appellant had an open settlement agreement based on discipline from two similar incidents. The settlement terms were that Appellant would receive a written reprimand, and be required to take two communication courses as well as complete an essay about diplomacy and tact. (Exhs. 4, 7.) Appellant completed both courses on June 30, 2104, three days after her email about the locked document. (Exh. 3.)

Because all the terms of the settlement had not yet been completed, Edwards contacted the City Attorney's Office and Human Resources Professional Ranea Taylor on July 3rd to obtain advice on handling Abraham's complaint against Appellant. After determining that there was no immediate threat requiring investigatory leave, Taylor

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1 Both incidents involved aggressive statements by Appellant that were critical of her managers. (Exh. 7.)
advised the Agency that she would begin an investigation. (Taylor, 9:22 am.) That same
day, Eftekharí met with the Agency's Finance Manager Chiquita McGowin to discuss the
matter. That afternoon, Eftekharí and Edwards met with Appellant and informed her that
the tone of her email was inappropriate, implying as it does that Abraham is incompetent
and does not do his own work. When Appellant asked why it was inappropriate, Eftekharí
pointed out the exclamation point and capitalizations within the email. (Eftekharí, 11:32
am.) Appellant testified that she added the exclamation point to emphasize that
Abraham had created a problem for her. (Appellant, 3:36 pm.)

After this meeting with her supervisors, Appellant phoned a co-worker from her
cubicle and complained loudly about Abraham for fifty minutes, during which Appellant
described exchanges between them. There is one empty cubicle between Appellant
and Abraham, and Abraham could clearly hear Appellant's side of the conversation. At
one point, Abraham walked in front of Appellant's cubicle to remind her that he could
hear her. Appellant continued her call. Abraham finally left the office to avoid hearing
more. Late that day, Appellant had another phone conversation with the speaker on.
The "(s)ubject matter (of her conversation) was still about me." (Exh. 6-2.)

Abraham compiled his notes about all four incidents and sent them to Taylor. He
repeated his request to be moved away from Appellant, and also asked that emails from
her be routed first to his supervisor. "I am through entertaining her foolishness. It’s
affecting my work in a negative way!" (Exh. 6.)

The Human Resources investigation ended with a conclusion that the matter
should proceed to formal discipline, and Appellant was served with a pre-disciplinary
letter on Aug. 15, 2014. (Exh. 1.) McGowin thereafter found that the conduct violated
several Career Service Rules, and that a three-day suspension was appropriate given the
failure of the recent written reprimand to correct the same type of behavior.

III. ANALYSIS

The Agency bears the burden to establish the asserted violations of the Career
Service Rules by a preponderance of the evidence, and to show that a three-day
suspension was within the range of discipline that can be imposed under the
Appellant has the burden of proof on her retaliation and discrimination claims. In re
Morgan, CSA 63-08, 9 (4/6/09) citing C.R.S. 24-4-105 (7).

A. VIOLATION OF DISCIPLINARY RULES

1. Careless performance of duties, CSR § 16-60 B.

An employee is careless in violation of this rule when she performs her duties
without exercising reasonable care, resulting in potential or actual significant harm. In
re Roberts, 40-10, 48-10, 10 (11/15/2010); citing In re Mounjim, CSA 87-07, 5 (7/10/08).

Finance Manager Chiquita McGowin made the decision in this case. McGowin
testified that Appellant's tone was careless in that she is expected to assist other
contract administrators in a polite and professional manner. (McGowin, 1:57 pm.)
Appellant's communications with Abraham were intentionally angry and accusatory.
Intentional wrongdoing falls outside the reach of this rule. In re Mouniim, CSA 87-07, 6,(7/10/08). In addition, the evidence does not show that Appellant was assisting other employees when she engaged in the four communications cited in the disciplinary letter. Therefore, the Agency failed to prove Appellant was careless in her duties.

2. Failure to comply with departmental regulations, CSR § 16-60 L.

An agency's written policies are enforceable under this rule if they are clear, reasonable, and uniformly enforced. In re Leslie, CSA 10-11, 11 (12/5/11), citing In re Cody, CSA 03-10, 5 (4/22/10). The Office of Economic Development’s operating policies require "cube dwellers" to "be aware of how loud your voice is when talking on the phone or to others around you so as not to disturb your co-workers." (Exh. 2-1.) The rule requires employees to consider the effect of their conversations on the productivity of their co-workers, and is therefore a reasonable regulation of workplace conduct.

Agency contract administrators work in close proximity to one another in a row of four cubicles. Appellant's cubicle abuts a window on the far side of the row. Co-worker Darlene Dominguez-Trujillo is located at the other side of the row, next to Abraham. There is an empty cubicle between Appellant and Abraham. Appellant is aware that she has a loud voice that "bounces off the glass" of her window. (Appellant, 3:21 pm.) Dominguez-Trujillo testified that she was able to hear Appellant's loud and frustrated voice over the cubicles on June 20th during Appellant's exchange with Abraham over a work issue. She also confirmed that she and Appellant spoke on the phone on July 3rd.

Abraham vividly described the 50-minute conversation he overheard on July 3rd. Appellant repeated details of their recent disputes, "saying mean things about me (like) 'he always has to have his way.'" (Abraham, 10:40 am.) After his walk in front of her cubicle failed to stop the loud conversation, Abraham left the office. Late that afternoon, Appellant had another call in which she continued to discuss Abraham, this time while her phone was on speaker mode. Appellant did not deny having these conversations, but said her phone was not on speaker. (Appellant, 3:32 pm.)

The evidence reveals that Appellant engaged in a loud and lengthy call complaining about Abraham, who was sitting two cubicles away. She was aware that her conversation was disturbing her co-worker because Abraham walked in front of her cubicle, then left the office when that did not correct her behavior. Three days before this occurred, Appellant had finished her communication courses about diplomacy and tact. In her essay, Appellant acknowledged that criticisms should be communicated privately. (Exh. 4-3.)

There was no evidence presented that the rule is not enforced on all employees. Here, Appellant interfered with Abraham's work for an hour, and forced him to choose between listening to her negative version of events or leaving his work station. Her conduct is a direct violation of this reasonable work rule, which establishes a violation of CSR § 16-60 L.
3. Intimidating or abusing employees, CSR § 16-60 M.

Intimidation as used in this rule refers to a threat intended to coerce another. In re D’Ambrosio, CSA 98-09, 8 (5/7/10) citing Black’s Law Dictionary (8th ed. 2004). The rule requires a level of wrongdoing and ill will beyond that which establishes a violation of § 16-60 O. See In re Roybal, 60-11, 6 (3/13/12).

McGowin found that Appellant intimidated Abraham by yelling at him on June 20th, and by having a long critical conversation about him on July 3rd at a sound level that carried over the cubicle walls. The evidence failed to show that Appellant’s discourteous phone call in Abraham’s presence contained any element of threat or intended coercion. In their absence, the Agency failed to prove a violation of this rule.

4. Intimidating a witness, CSR § 16-60 N.

The Agency withdrew this allegation at hearing, and therefore it is not considered in determining the issues raised in this appeal.

5. Failure to maintain satisfactory work relationships, CSR § 16-60 0.

This rule is violated by conduct that would cause a reasonable person to know it would be harmful to a co-worker or member of the public, or would have a significant impact on her relationship with any of them. In re Rodriguez, CSA 12-10, 18 (10/22/10), citing In re Burghardt, CSB 81-07, 2 (8/28/08).

Over the course of two weeks, Appellant yelled at Abraham, demanded his forgiveness, accused him of copying and interfering with her work, and engaged in a long, loud and negative conversation about him with a co-worker. As a result, Abraham became so upset that he asked to move his work station and avoid direct emails from her. Abraham testified that he believes he needed “to minimize the ongoing humiliation” by avoiding contact with Appellant. (Abraham, 10:34 am.) His supervisor granted his request, and he now sits far away at the front desk, where he testified that it is “really nice.” As a result, Appellant’s valuable skills and experience are less available to Abraham, adversely affecting the efficiency of the unit.

Unfortunately, Appellant interpreted Abraham’s questions as annoying, and his use of her contract draft on June 27th as unethical, rather than an effort to use team resources to accomplish their work. Her accusation of plagiarism arose from her position that her contracts cannot be used without her permission. (Appellant, 3:40 pm.) On the contrary, the evidence demonstrated that her work product is the property of her employer. Appellant admits that contracts are team efforts that are maintained on the share drive, and members of the group are expected to assist each other as needed. (Appellant, 9:24 am.) Templates and working drafts are often assembled in work groups, and specific sections are shared as needed by individual contractual relationships. (Appellant, 3:37-3:45 pm.) Contract administrators share their documents as a matter of course, and borrow language from other city contracts as needed by the workload. (McGowin, 2:18 pm, Abraham, 11:14 am.)
Appellant’s assumption that Abraham was “getting back” at her by locking her out of a document was based in part on her lack of knowledge that her “read only” contract could have easily been edited by renaming the document. As noted by McGowin, a person with Appellant’s years of experience is expected to know common Word functions such as “save as” to create a new editable copy. (McGowin. 2:19 pm.) Under the pressure of a looming meeting where she needed the contract, her frustration at being confronted with a message that she was “locked out!” is understandable. However, after that moment passed, Appellant voiced that frustration in an inappropriate manner by accusing Abraham of hindering her performance and improperly copying her work product. While admitting that contracts are a team effort and that her experience is a valuable asset to her co-workers, Appellant never acknowledged that Abraham’s use of her contract as a guide was expected and appropriate in the team environment.

Four days before this event, Appellant acknowledged that her June 20th “outburst” had the potential to damage their work relationship, and stated in her emailed apology that she wanted “to preserve our relationship. Truce?” (Exh. A.) Three days after that apology, Appellant accused Abraham of unethical conduct. As a result of Appellant’s displays of temper over this two-week period, Abraham sought separation from Appellant’s work area and emails. Ultimately, his request to be moved was granted. This is undisputed evidence that Appellant’s actions caused real harm to their working relationship during the very time when Appellant had been given training on diplomacy and tact.

At hearing, Appellant did not deny that these incidents occurred. She stated that she is a former teacher of the deaf who has not yet broken a habit to speak loudly. Appellant believes that she must express herself clearly to obtain needed outcomes from vendors and peers. She is assertive because “I have to have command of my environment.” (Appellant. 3:25 pm.) Appellant conceded that she and her co-workers “have a standing joke” that Abraham is “a drama queen... (we say) ‘oh shut up, Sam chh here we go Sam’, and so we all do that and he kind of laughs along with us.” She explained that Abraham never told her it was hurtful, and that she stopped doing that over a year ago. (Appellant. 3:35 pm.) This corroborates Abraham’s testimony that Appellant had embarrassed him before these events occurred, and that the conduct would continue unless he stopped condoning it by trying to “laugh it off.” (Abraham, 10:27 am.) I find that a reasonable person in Appellant’s position would have known her conduct endangered their ability to work together harmoniously. The Agency therefore proved Appellant failed to maintain a satisfactory relationship under CSR § 16-60 M.

6. Conduct violating rules or other legal authority, CSR § 16-60 Y.

Finally, the Agency alleges that Appellant’s conduct constituted violence in the workplace under Executive Order 112 §3.0 (b). That section defines violence as “the actual or attempted: threatening behavior, verbal abuse, intimidation, harassment, obscene telephone calls or communications through a computer system, swearing at or shouting at, stalking” of another person. (Exh. 0-2.)

As noted above, the Agency did not establish that Appellant’s conduct was intimidating, threatening or abusive under § 16-60 M. Her communications conveyed anger, but did not contain obscenities or swearing, and were unaccompanied by violent gestures or actions. I do not find that the ability of other employees to hear
Appellant's loud voice in an open environment shows the same severity of conduct as illustrated by the examples included in the rule's definition of violence. See In re D'Ambrosio, CSA 98-09, 10 (5/7/10); In re Owens, CSA 69-08, 6 (2/6/09) (holding that loud and frustrated statements are insufficiently egregious to violate the executive order.)

B. PENALTY

In imposing a three-day suspension, the Agency decision-maker was strongly influenced by the fact that Appellant had been recently disciplined and given additional training based on similar inappropriate workplace communications, neither of which had succeeded in changing her behavior. Appellant does not deny that she is perceived as verbally aggressive because she expresses herself forcefully. She claims her manner is a learned style developed from her career as a teacher, and that it simply indicates she is passionate about her work. (Appellant, 1/6/15, 11:12 am.) However, Appellant was not communicating about any work assignment at the time of these incidents. Instead, she was expressing her anger at her co-worker for behavior she viewed as annoying or objectionable. In any event, the evidence showed her sustained irritation has adversely affected Abraham's ability to work with her, to the detriment of the contracts unit. The Agency's concern at this disciplinary stage must be what level and type of penalty is both suitable to the nature of the misconduct and designed to correct the behavior. McGowin reasonably eliminated a second written reprimand, since the recent one had not effectively deterred a repetition. McGowin therefore progressed to a short suspension in the hope that it would motivate the needed change.

Appellant argues that she was treated less favorably than a male employee, who was given counseling, a performance improvement plan and a transfer to a different supervisor for a similar blow-up at a staff meeting. The Agency counters that the male employee's conduct and employment history called for a different response. On its face, it is not clear that the discipline imposed on the male employee is less severe than Appellant's simple suspension. Attempts at comparisons falter unless all the underlying facts and circumstances are known. Since employees and situations may be complex, a hearing officer on review must defer to an agency's disciplinary solution designed to enforce its standards unless it is clearly excessive or imposed arbitrarily; that is, based substantially on considerations unsupported by record evidence. In re Economakos, 28-13A (CSB 3/24/14), citing City and County of Denver v. Weeks, 10CA1408 (Colo.App. 2011) (unpublished). This suspension is well within the range of punishment that is appropriate for the proven violations of CSR § 16-60 L and O.

C. RETALIATION CLAIM

Appellant claims that her discipline was taken in retaliation for her grievances against Sam Abraham and Nicole Edwards based on the events of June 27th. The first grievance alleged that Abraham "purposefully locked (her) out of a contract." After an OHR investigation, McGowin denied the grievance on the ground that Abraham's actions were "not unreasonable" and did not violate any city rules. McGowin found there is no expectation of exclusive use related to documents in a share drive, and Abraham's action was inadvertent. (Exh. E.) That same day, Appellant grieved Edwards for embarrassing her by highlighting her errors to customers. That grievance too was denied after McGowin handled the matter by speaking to Edwards. (Exh. F.)
Based on the additional evidence admitted at hearing about these events, I find that the Agency's denial of the grievances was balanced and reasonable. Appellant offered no evidence that either grievance caused any ill feeling in McGowin, as they were not directed at her conduct. Appellant therefore failed to meet her burden to prove a causal link between her protected activity and the discipline issued in September.

D. DISCRIMINATION CLAIMS

Appellant also claims that the discipline was imposed based on her race, color, sex and/or age. Appellant argues that she is viewed by her managers through a stereotypical lens as an African American woman, and expected to behave in a certain manner. Appellant testified that McGowin, who is an African American woman with 20 years with the city, treats quiet employees who don't ask questions more favorably than she treats Appellant. Appellant expresses herself clearly and passionately, and questions management when she disagrees with it. (Appellant, 1/6/15, 11:10 am.) Appellant did not offer any basis for concluding that a preference for quieter employees bears any relation to race, color, sex or age.

Appellant argued that she was treated more harshly than an African American male who lost his temper at a staff meeting. Taylor acknowledged that she had witnessed the behavior of the male co-worker. As a result of his conduct, the employee was formally counseled, placed on a performance improvement plan (PIP), and transferred to a different supervisor. In contrast to Appellant, the male employee had no recent discipline of the same type. In addition, his team was undergoing stressful changes and an increased workload, which were seen to have contributed to his outburst. Taylor believed his discipline was calibrated to his situation. Appellant had already received training in Crucial Conversations with her team, and had been given a written reprimand and mandatory communication courses for previous inappropriate communications. The Agency weighed all of these factors in determining what would produce the best results for the individual employee. (Taylor, 1/6/15, 10:35 am.) There was no countervailing evidence that proved the Agency was motivated by Appellant's sex in imposing a suspension rather than the discipline imposed on the male employee.

As to the age claim, HR Professional Taylor confirmed that HR sends the Agency a list of employees who are eligible for retirement every year between January and March and again in June or July. (Taylor, 9:12 am.) McGowin testified that she was unaware that Appellant was eligible to retire until she was informed of that fact during her testimony at the hearing. (McGowin, 2:10 pm.) There was no other evidence presented that was relevant to this allegation. Most persuasively, Appellant herself testified that she believed she was disciplined because of her tendency to speak authoritatively and to challenge management, qualities that are independent of a person's race, color, sex or age. (Appellant, 1/6/15, 11:10, 11:20 am.)

Order

Based on the foregoing findings of fact and conclusions of law, the following orders are entered:

1. The three-day suspension imposed on September 9, 2014 is AFFIRMED.
2. The retaliation claim is DISMISSED as unproven.
3. The discrimination claims on the bases of race, color, sex and age are DISMISSED as unproven.

Dated this 18th day of February, 2015.

Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with the requirements of CSR § 19-60 et seq., within fifteen calendar days after the date of mailing of the Hearing Officer’s decision, as stated in the decision’s certificate of delivery. 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, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND opposing parties or their representatives, if any.

I certify that on February 18, 2015, I delivered a correct copy of this Decision and Order to the following:

Victoria Lindsay, Victoria.lindsay@denvergov.org
Vernon Howard, vernh@comcast.net
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[Signature]