DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

RUSSELL LUXA, Appellant,

vs.

DEPARTMENT OF PUBLIC WORKS,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal commenced on Feb. 29 and concluded on Jun. 18, 2012 before Hearing Officer Valerie McNaughton. Appellant was present and represented by Marilee E. Langhoff, Esq. Assistant City Attorney Franklin Nachman represented the Agency in these proceedings. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order.

I. STATEMENT OF THE APPEAL

Appellant Russell Luxa appeals his Aug. 31, 2011 termination from the position of Manager with the Denver Department of Public Works (Department), also asserting retaliation for participation in an internal investigation and a claim under the Whistleblower Protection Ordinance, D.R.M.C. § 2-106 et. seq.

The following exhibits were admitted into evidence: Agency Exhibits 1 to 10; 12, 13 to 13-3; 13-18 to 24 as redacted, 13-30 to 37; 13-43 to 53, 13-59 to 61; 14 to 17; 18-1 to 14, and Appellant's Exhibits A to D; F; H; I; J-1 to 2; L to N; P; R; U to CC; DD-7, DD-8, DD-24; EE, FF, KK HH, II and LL.

II. ISSUES

The issues in this appeal are as follows:

1) Did the Agency establish by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules (CSR);

2) Did the Agency establish that termination was within the range of penalties that could be imposed by a reasonable administrator for the violations proven by the evidence;

3) Did Appellant establish that the termination was imposed in retaliation for Appellant's Jan. 2011 participation in an internal investigation into a bullying complaint; and

Although these investigative interviews and statement were admitted at the hearing on March 1, 2012, they were inadvertently omitted from the Final List of Admitted Exhibits dated June 18, 2012.
4) Did Appellant establish that the termination was imposed in retaliation for his whistleblower activity, in violation of D.R.M.C. § 2-107 et. seq.?

III. FINDINGS OF FACT

A. Factual Background

Appellant Russell Luxa was hired as an engineer by Denver Public Works in 1999. He was promoted to Engineer/Architect Supervisor in 2003, and to Manager 1 in the Major Projects Office in 2007. He received outstanding or exceptional performance reviews for the first decade of his employment with the city. [Exh. X.]

Appellant accepted the promotion to Manager 1 based on his understanding that he would play a key role in managing construction of the Denver Justice Center. [Appellant, 5/2/12, 8:56 am.] The Denver Justice Center was a $400 million bond project to design and build the new Lindsay-Flanagan Courthouse and Van Cise-Simont Pre-Arraignment Detention Center, on which construction began in the fall of 2006. Upon his promotion, Appellant was initially very involved in the design, contract, permitting, and engineering aspects of the project, using his connections with colleagues at Denver Water and Qwest. As Manager of the Major Projects Office, Appellant coordinated with the city's engineering contractor for the Justice Center, Jacobs Engineering, and its Program Manager, Dick Gillet.

As time went on, his project role changed. Appellant began to learn of meetings to which he had not been invited, and came to believe his work suffered because he lacked knowledge of strategies discussed at those meetings. City Engineer Lesley Thomas noticed there was tension between Appellant and Mr. Gillet. On multiple occasions, Appellant expressed to Ms. Thomas his concerns about both his exclusion from meetings and Mr. Gillet's unwillingness to meet with him weekly to review his spreadsheets. [Appellant, 5/2/12, 8:52 – 9:12 am.]

For the past twelve years, Mr. Gillet has served as a full-time consultant with the City and County of Denver on large bond projects. The Jacobs team maintains offices at the Wellington Webb Municipal Office Building within Public Works. Mr. Gillet's relationship with Appellant was very friendly until 2007, when they began to work together on construction of the Justice Center. During that project, Appellant regularly expressed to Mr. Gillet his frustration that Ms. Thomas was not giving him enough responsibility. At an April 2010 meeting, Mr. Gillet noticed that his mention of Ms. Thomas became "a lightning rod", prompting Appellant to pace around the room while gesturing and loudly complaining about Ms. Thomas. Later that day, Appellant approached Mr. Gillet's cubicle and offered him an animal cracker, stating, "I yelled at my friend." Mr. Gillet eventually asked Ms. Thomas to remove Appellant from Jacobs’ reporting structure because of Appellant's animosity toward Ms. Thomas. [Gillet, 2/29/12, 10:29 – 10:50 am; Exhs. 13-51, 17; Appellant, 5/2/12, 2:15 pm.]

The Justice Center construction project was completed in 2011, and was celebrated on April 9th at a Spring Gala held at the new courthouse complex. Appellant complained to his subordinate Mike Sheehan that he was given only one ticket and was not included in the Gala's planning phase. On the night of the event, Mr. Gillet observed that Appellant appeared to be upset. [Gillet, 2/29/12.] Ms. Thomas saw Appellant standing outside the group wearing dark glasses, which seemed odd to her. [Thomas, 3/1/12, 11:05 am.] Others told Ms. Thomas that Appellant was seen holding hands with the Mayor's Chief of Staff
Roxanne White. [Thomas, 3/1/12, 11:51 am.] Appellant testified that he offered Ms. White his arm to guide her over the new sod, and she thanked him for his assistance. [Appellant, 5/2/12, 9:15 am.]

During the party, Appellant called Jacobs sub-consultant Lottie Dula on her cell phone to ask where she was. He then expressed his frustration over being excluded from planning the celebration, emphasizing that he was passionate about the project. [Appellant, 5/2/12, 2:25 pm.] At the time, Ms. Dula was in California tending to a dying relative, but Appellant did not know that until the end of the call. "I was quite emotional. I was at the point of crying . . . I kind of needed someone to lean on that night, and she was a good friend at that time." [Appellant, 5/31/12, 9:19 am.] After about fifteen minutes, Ms. Dula told him that she had to get off the phone, because she was at a hospice with a relative. Ms. Dula testified that she had notified everyone, including Appellant, that she would be out of town on a family emergency. She took the call thinking it was a work emergency, but then listened to Appellant and tried to calm him down because he was very distraught. Ms. Dula was very angry about the call, and emailed Mr. Gillet that evening to complain about it. [Dula, 6/18/12, 9:45 am.] The following Monday, Appellant went to Ms. Dula's desk and apologized profusely for his call. "I wouldn't have called if I'd known that [she was at a hospice]." [Appellant, 5/2/12, 9:19 am, 2:24 pm.]

Shortly thereafter, Lesley Thomas and HR Director Bill Miles informed Appellant's supervisor Mitch Kumar that Appellant's behavior at the Gala was odd and called into question his ability to act as a manager. Mr. Miles related comments he had received from several other employees with concerns about Appellant's recent behavior. Appellant's direct report Mike Sheehan had told Mr. Miles that Appellant's directions were erratic. Mr. Gillet complained that Appellant violated his staff's personal space, spoke loudly and gestured extravagantly during conversations and meetings. Ms. Dula echoed those comments, and added Appellant continually spoke negatively about the department. Terry Goodwin and Kevin Nagler reported that they passed Appellant in the hallway on the 6th floor one day, and noticed he looked upset. When they asked him what was going on, Appellant broke down crying.

After discussing the matter, Ms. Thomas, Mr. Kumar and Mr. Miles decided to place Appellant on investigative leave to determine his fitness for duty. [Kumar, 4/16/12.] Mr. Kumar and a security official met with Appellant on April 13th at the Wastewater Building, and served him with the notice of investigatory leave. [Exh. A.] He informed Appellant that the leave was the result of his behavior at the Justice Center Gala. Appellant appeared surprised and emotionally drained. [Kumar, 4/16/12, 8:56 am.]

A week later, Mr. Kumar wrote Appellant that the leave was in response to "complaints and concerns that were raised recently about inappropriate and disconcerting interactions you have had with various individuals over the past few weeks, [and] our corresponding concerns about your present ability to perform your job duties." [Exh. 5.] The letter ordered Appellant to undergo an independent medical examination by the city's psychiatric consultant, Dr. Gary Gutterman. Appellant fully cooperated with that evaluation, which included two meetings with Dr. Gutterman.

On May 14, 2010, Dr. Gutterman issued his report, which concluded that Appellant was not a danger to himself or others and was capable of returning to work. He added that Appellant's return could be done in a phased-in manner to "allow him to adapt to re-entry more effectively." Dr. Gutterman recommended that Appellant continue to meet with the Director of Employee Assistance, and remain on the medication Celexa for an additional six
to 12 months. [Exh. C.] The investigative leave was thereafter extended until June 26, 2010 to allow completion of the planning for Appellant’s return to work. [Kumar, 4/16/12; Exh. D.]

While out on leave, Appellant spoke with Mr. Kumar by phone three to five times, and always asked him why he was placed on leave. Mr. Kumar listed three or four other behaviors, including his wearing of sunglasses at the evening Gala. Appellant responded that he still had not been given the details he needed to understand the reason for the leave. Appellant’s leave was extended once to allow time to finalize the evaluation and plans for his return to work. [Exh. 6.]

Appellant also asked Mr. Miles to tell him why he had been placed on investigative leave. Mr. Miles recalled at hearing that he had told Appellant on two occasions that the Agency had received a number of recent reports of disruptive and escalating behavior at meetings. Mr. Miles specifically recalled telling Appellant that the last report was the observations of Mr. Goodwin and Mr. Nagler, who stated that Appellant started to cry when they asked him what was going on. Appellant told Mr. Miles that he did not think those were the real reasons for the leave. [Miles, 5/1/12, 11:10 am.] At hearing, Appellant stated, "I still don’t know why I was put on fitness for duty evaluation." [Appellant, 5/2/12, 9:45 am.]

Mr. Kumar did not believe Appellant was a threat to anyone, but he followed the advice of Ms. Thomas and Mr. Miles in meeting Appellant away from the Webb Building and requiring investigative leave for a fitness for duty evaluation. [Kumar, 4/16/12.] Mr. Kumar had not attended the Gala, but was told that Appellant had been seen sitting silently in a corner at the Gala and appeared to be crying. At one point, Appellant asked the Mayor’s Chief of Staff Roxanne White to take his hand and walk with him into the event. In light of Appellant’s often-repeated inquiries about the reasons for the decision, Mr. Kumar believed they should have given him more details before placing him on leave. In any event, he later told CSA investigators, “I believe he knows why he was on leave... I don’t know how he cannot know.” [Exh. 13-45.]

On June 24, 2010, Mr. Kumar and Mr. Miles met with Appellant for 1 1/2 hours at a Starbucks coffee shop to discuss his return to work and to deliver a letter of instruction. [Exh. BB.] The letter outlined various organizational changes that had occurred during his absence resulting from one high-level retirement, two transfers, one new direct report and alterations in portfolio management. The transition plan was designed to “lighten my workload. I thought that it definitely needed to be reduced.” [Appellant, 5/2/12, 2:55 pm.] However, Appellant was also concerned that removal of his managerial duties could result in an audit and reclassification of his position from manager to supervisor. [Appellant, 5/31/12, 9:15 am.]

In response to Appellant’s complaints about Ms. Thomas at this meeting, Mr. Miles stated, "[y]ou need to watch out because Lesley Thomas will pick you off one by one.” [Kumar, 4/16/12.]

The letter of instruction delivered at the meeting also detailed management’s behavioral expectations for Appellant once he returned to work. He was ordered to attend certain training, prepare a transition plan, maintain constructive interaction with others, promote a positive impression of the department, and "exhibit a professional and helpful communication style. This means that your conversations will be focused on the business at hand. You will exercise restraint from emotional outbursts, and avoid character attacks and bringing up issues from the past.” [Exh. BB-6.] Appellant understood what was expected of him with regard to communications, avoiding friction with others, and exercising tact and diplomacy. [Appellant, 5/2/12, 3:03 pm; Exh. BB-4.] After going over the letter of instruction,
Appellant returned to work the following day. He began to prepare his transition plan, including a strategy and work flow for how he would meet his current job requirements. [Appellant, 5/2/12, 9:44 am.] Over the next several weeks, Appellant and Mr. Kumar exchanged 15 to 20 drafts before Mr. Kumar approved the eight-page plan entitled "Lines of Communication and Work Flow." [Exh. CC.] Mr. Kumar and Mr. Miles supported Appellant's position that he should have two supervisors under him, and project managers answering to them. [Appellant, 5/2/12, 9:48 am.] Appellant did not thereafter submit a workload analysis or a formal staffing request to fill those positions. [Thomas, 3/1/12, 2:38 pm.]

Mr. Kumar held daily meetings with Appellant intended to help him manage his projects, his work stress, and his feelings that he was not treated fairly by Ms. Thomas during the Justice Center project. Those meetings often consumed 90 minutes, much longer than his meetings with his other direct reports. Despite these efforts to help Appellant, Mr. Kumar observed that Appellant was becoming even more critical of Ms. Thomas. [Kumar, 4/16/12.]

On September 27, 2010, Appellant was given a written reprimand for pushing Financial Management Specialist Gretchen Hollrah. [Exh. 9.] Ms. Hollrah reported that Appellant approached her in August to describe a long series of problems he was having at work, starting from the former Public Works director Stephanie Foote to the current City Engineer Lesley Thomas. As he discussed his "theories about who he can trust . . . [it] seemed to put him in a state of rage." Appellant told her that he was being pushed around by management, and illustrated his point by pushing Ms. Hollrah twice rapidly from behind, hard enough to throw her off balance. "I don't think he meant to hurt me, but I also don't think he had control in that situation." As a result, Ms. Hollrah stated she was unwilling to be in a confined meeting room space with him, without other people present. [Exh. 9-10.]

During the pre-disciplinary meeting over this incident, Appellant admitted that he voiced his frustrations to Ms. Hollrah on the date in question. He apologized "for whatever I intimidated her with at all." [Exh. 9-7.] At hearing, Appellant admitted that he was frustrated and grabbed Ms. Hollrah's shoulders while talking to her about management, and that she was pushed off her feet as a result. [Appellant, 5/2/12, 3:18 pm.] Mr. Kumar imposed a written reprimand after finding that Appellant physically pushed Ms. Hollrah and knocked her off balance, in violation of Executive Order 112 and the expectations communicated in the June letter of instruction. The reprimand informed Appellant that "[a]ny further actions of this nature will not be tolerated and will lead to further discipline up to and including termination." [Exh. 9-7.]

Appellant agreed at hearing that he voiced his displeasure with the 2010 investigative leave during this incident and to several other people after his return from leave, including Engineer Steve Forvilly and Administrative Assistants Corinna Lujan and Patti Abeyta Chism. "I was always trying to find out [why I was placed on leave]." [Appellant, 5/2/12, 3:40 pm.] At managers' meetings, Appellant sometimes described his interactions with Ms. Thomas and complained he was being bullied by her. He also told those at the meeting that he believed Ms. Thomas was the problem in the Agency. [Appellant, 5/31/12, 9:20 am.] He understood that he could be disciplined for discussing past issues with other employees. [Appellant, 5/2/12, 3:44 pm; Exh. 9-7.] Appellant clarified at hearing that he was not physically bullied by Ms. Thomas, and does not consider corrections made by a supervisor as bullying. [Appellant, 5/31/12, 9:47 am.]
B. 2011 Investigation into Employee Complaints

In April 2011, Human Resource (HR) Supervisor Kathy Billings was assigned to investigate a harassment complaint by Senior Engineer Robert Alson against Appellant, who was Mr. Alson's supervisor. Mr. Alson alleged that Appellant was condescending to him during a meeting in Appellant’s office, and wrote on his white board, “Robert doesn’t think he as the PM has to sign monthly construction pay applications.” Ms. Billings found that Appellant’s conduct did not rise to the level of harassment, but that it was inappropriate. [Billings, 3/1/12, 9:26 am.]

On May 3, 2011, HR Supervisor Roxanne Stuber received a complaint from Budget Director Ed Scholz that Appellant had become enraged at Ms. Hollrah after a bond team meeting in late April. Ms. Billings and HR Generalist Erin Mischo Quintana were assigned to investigate that complaint.2 The two interviewed twelve of Appellant’s co-workers to ask if they had witnessed inappropriate behavior by Appellant. Seven of the interviews were admitted into evidence in this appeal. [Exh. 13.] On June 16, 2011, the investigators transmitted their summary of findings to the Manager of Public Works. The investigation found that Appellant had engaged in inappropriate and aggressive behavior in the workplace, and had violated his 2010 Letter of Instruction by discussing his past issues and making derogatory comments about management. [Exh. 12.]

C. Pre-Disciplinary Proceedings

On July 15, 2011, Appellant was placed on investigative leave for the second time, and served with a pre-disciplinary letter describing three incidents: the April meeting with Mr. Alson, the May confrontation of Ms. Hollrah, and unprofessional conduct toward his supervisor Mr. Kumar during a June meeting. [Exh. 4.] After the investigative report was submitted, CSA received two additional complaints against Appellant. [Mischo Quintana, 2/29/12, 4:51; Exhs. 13-59, 14.] On Aug. 4, 2011, a revised pre-disciplinary letter was sent, which added details from the investigation and three new allegations: 1) Appellant directed Real Estate Analyst Kasha Przywitowski not to tell her supervisor about issues with a project because it could get Appellant in trouble; 2) Appellant angrily confronted Ms. Przywitowski on June 28th and told her she pulled project information "out of her ass"; and 3) Appellant told Facilities Manager Suzi LaTona that he was taking "a fistful of medication" to get through work every day, and that his career had been ruined by Ms. Thomas, Mr. Scholz and Real Estate Direct Jeffrey Steinberg, adding, "it's not over either." The pre-disciplinary meeting on all of these allegations was rescheduled for Aug. 12, 2011 to give Appellant time to respond to the new information. [Exh. 3.]

Appellant attended the pre-disciplinary meeting on Aug. 23, 2011 with his attorney, Marilee Langhoff, Esq. They presented a written statement by Appellant and a new report from Dr. Gutterman, which reiterated his opinion that Appellant was not a danger to himself or others in the work environment, and was capable of returning to work. [Exhs. 18 to 18-2; 18-12 to 18-13.] Appellant’s statement acknowledged that he "could have handled some of these situations better", and that at times was "less than totally professional."

2 Former CSA Human Resources Generalist Guy Pizzulo also participated in four of the witness interviews. He testified that Ms. Stuber told him that her job as investigator was to "get [Appellant's] ass fired." [Pizzulo, 2/29/12, 11:57 am.] Mischo Quintana denied Ms. Stuber made a similar statement to her. "If I was told that, because my personal integrity is a priority to me personally, I would have gone to her director to discuss the concern." [Mischo Quintana, 2/29/12, 4:35 pm.]
That said, I am also formally requesting that Executive Management of Public Works . . . take immediate steps to rectify serious inequities between certain divisions of Public Works, to rid Public Works of the bullying . . . and to assist me in repairing the reputational harm caused by the manner in which I have been treated by the City for the past few years.

[Exh. 18.]

In the remainder of his response, Appellant asserted that he was hampered in his ability to perform his duties by being denied the responsibility, staff and resources given to other Manager 1s. He claimed that his 2010 investigative leave ruined his reputation, and that his treatment by the Agency was a form of bullying that must be addressed. Appellant stated the Agency ignored his repeated requests to learn the reason for the leave, which he pressed so that he could counter the perception that he was "crazy or dangerous". He denied that he neglected his duties or was careless in performing them, citing his successful rating in his latest Performance Enhancement Program Report (PEPR) and four certificates of special recognition from 2000 to 2011. [Exhs. 10; 18-1; Y.] The response did not directly address the six specific allegations of misconduct made in the pre-disciplinary letter. [Exh. 18-1.]

On August 31, 2011, Appellant was dismissed from his position based on the Agency's conclusion that he violated eight disciplinary rules as a result of the above incidents. [Exh. 2.]

D. Asserted Grounds for Dismissal

1. April 8, 2011 Criticism of Robert Alson Written on Board

The dismissal letter first asserted that Appellant had a meeting with his subordinate Robert Alson on April 8, 2011, during which Appellant behaved unprofessionally. Appellant called the meeting to discuss why Mr. Alson had failed to sign monthly pay applications as required by the existing protocol. Mr. Alson explained that he did not think he as Program Manager was required to sign them. Appellant was shocked because he believed "that is the first thing you learn as a PM". Appellant asked him, "[h]ave you lost your capability to be a PM?" [Appellant, 5/2/12, 4:15 pm.] Since he and Mr. Alson had had previous communication issues, Appellant wrote on his office white board, "Robert doesn't think he as the PM has to sign monthly construction pay applications". He testified that he did so "to prevent work games," and to make sure they were both on the same page. [Appellant, 5/2/12, 1:35 pm.] Appellant admits that this meeting was "a very heated exchange on both ends." [Appellant, 5/2/12, 1:35 pm.] A co-worker outside the closed office confirmed that the two were arguing loudly, and that Mr. Alson appeared shaken when he emerged. [Exh. 13-2.] The comment remained on the board after the meeting. [Appellant, 5/2/12, 4:12 pm; Stuber, 5/31/12, 10:50 am.]

Mr. Alson complained to Human Resource (HR) Services that Appellant was condescending to him during that meeting, and that the comment left on the board constituted bullying and harassment. As noted above, the investigation found that the conduct was not bullying, but that it was inappropriate and unprofessional. [Stuber, 5/31/12, 11:09 am.]
2. April 27, 2011 Confrontation with Gretchen Hollrah

The disciplinary letter next alleged that Appellant was aggressive and confrontational toward Ms. Hollrah at a meeting on April 27, 2011. The Agency presented Ms. Hollrah's statement to the CSA investigators, which recounted that Appellant "became enraged that I once again disagreed with him . . . Russell began pantomiming wildly at me, making an exaggerated gesture of sealing his lips shut and glaring at me, until I excused myself and walked away." [Exh. 13-35.]

Appellant recalled the conversation with Ms. Hollrah differently, but admitted that his behavior was less than professional. [Appellant, 5/31/12, 8:54 am.] He stated that he asked Ms. Hollrah not to embarrass him in front of his colleagues. He was upset about an additional 5% contingency added for capital project budgets, complaining that no one had told him about this new requirement. [Appellant, 5/2/12, 4:19 - 4:31 pm.] He stated that Ms. Hollrah agreed with him, but told him it was a management decision. Appellant then showed her a spreadsheet to illustrate his staffing struggles. He denied that he pantomimed or sealed his lips on that day, but admitted he has made that gesture before. [Appellant, 5/2/12, 4:31 pm.]

3. Encounters with Kasha Przywitowski

During May and June, 2011, Appellant was working with Real Estate Analyst Kasha Przywitowski on a space planning project at the Arie P. Taylor Municipal Building. The disciplinary letter alleged that sometime in May, 2011, Appellant ordered Ms. Przywitowski not to tell her supervisor, Real Estate Director Jeffrey Steinberg, about issues with the project because it could get him in trouble. The letter also asserted that on June 28th, Appellant angrily confronted Ms. Przywitowski in a 6th floor hallway and demanded that she step into an empty office or he would speak to her boss. Once in the office, Appellant accused Ms. Przywitowski of pulling project information "out of your ass", and told her she had no authority to contact his staff for project assistance. [Exh. 2-3.]

Ms. Przywitowski testified that Appellant had raised his voice in frustration when he told her in May not to inform Mr. Steinberg about deadlines he had missed on the project. She did not feel comfortable with that instruction, and thereafter did communicate with Mr. Steinberg about the issues. On June 28th, Ms. Przywitowski was walking down a hallway and heard Appellant shout her name in an agitated state from 40 to 50 feet away. He pointed at her and yelled, "[y]ou got me in trouble." Appellant gestured for her to go into the empty office several times. Ms. Przywitowski initially refused. After he told her he would speak with her boss immediately, Ms. Przywitowski went into the office with him. Once there, Appellant said she generally pulls project information "out of [her] ass", and criticized her for contacting his staff. Ms. Przywitowski was intimidated by Appellant's behavior and confused by his statement, since she had been instructed to work through Public Works' Real Estate liaison, not through Appellant. Ms. Przywitowski felt Appellant was threatening her, and reported the incident to her supervisor. [Przywitowski, 2/29/12, 2:03 pm.] She later gave a statement recounting the event to Human Resources. [Exh. 13-59.] Mr. Steinberg was himself interviewed by HR investigator Erin Mischo Quintana about Appellant's conduct. He signed the interview summary prepared by Ms. Quintana, which corroborated Ms. Przywitowski's testimony. [Steinberg, 6/18/12, 9:14 am; Exh. 13-60 to 61.]

Appellant recalled at hearing that he had been trying to reach Ms. Przywitowski for several days about a matter of "huge urgency". When Appellant saw her in the hallway, he said, "Kasha, I need to talk to you." He asked her if she would mind going into an empty
room, explaining that he did not want to have this conversation in the hallway. When they were in the room, he told her not to give her supervisor the wrong information. "There were raised voices from both of us." [Appellant, 5/2/12, 11:56 am.] He admitted he might have stated that she "pulled project information out of her ass", and that would be inappropriate in the work context. [Appellant, 5/2/12, 4:40 pm; 11:56 am.]

4. June 28, 2011 Actions toward Mitch Kumar

The Agency found that Appellant was unprofessional, inappropriate and insubordinate to Mr. Kumar at a project meeting when in response to Mr. Kumar's project expectations Appellant put his hand up and told the other attendees, "[m]y boss would like me to put a schedule together, but I cannot do that." [Exh. 2-3.]

Appellant had been assigned to finish the remodel of the Arie P. Taylor Building by Sept. 30, 2011, the date federal construction funds would expire if the project was not completed. Problems were mounting based on internal disagreements and a challenging outside contractor. "We were against the wall", and mistrust was developing within the project team. In addition, Mr. Kumar had just been informed by Ms. Thomas that Appellant had told Ms. Przywitowski not to talk to her supervisor about project issues. In light of those facts, Mr. Kumar asked Appellant to prepare a work schedule. Appellant was irritated because he did not think a schedule was necessary. [Kumar, 4/16/12.] Mr. Steinberg recalled that the project was three to five months overdue despite three months of meetings meant to resolve project timelines. "Russell held up his hand in Mitch's direction as a gesture of silencing him while he addressed the others present at the meeting, stating, '[m]y boss would like me to put a schedule together, but I cannot do that!'" Appellant was agitated and complained loudly about the contractor and his employees' inability to get the project done. [Steinberg, 2/29/12, 2:48 pm; Exh. 13-61.]

Appellant admitted that he said something very similar to the statement alleged, but added that they were only a few days from the completion date and that paint and carpet were the only things left to do. He was frustrated because he believed seven rooms of paint and carpet did not justify the time to prepare a project schedule. Mr. Kumar countered on rebuttal that the remaining work also included electrical and other remodel work. [Kumar, 6/18/12, 10:15 am.]

After the meeting, Mr. Kumar told Appellant he thought his comment to him was inappropriate. Appellant agreed and apologized to Mr. Kumar, suggesting that in the future they could avoid the problem by developing a game plan before meetings. [Appellant, 5/2/12, 11:47 am.] Ultimately, Appellant did prepare the schedule and the project was completed on time. [Appellant, 5/2/12, 11:42 am; Kumar, 4/16/12.]

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3 This evidence was rebutted by Mr. Steinberg's contemporaneous notes showing that the incident occurred on June 28, 2011, and Mr. Kumar's testimony that the Sept. 30, 2011 deadline for drawing down the indentified federal funds gave them several weeks before the project must be completed. [Exh. 13-61; Kumar, 4/16/12.] In addition, Appellant was on leave and out of the workplace on July 15, 2011, ten weeks before the project deadline.
5. July 14, 2011 Call to Suzi LaTona

A few weeks after the Arie P. Taylor meeting, Appellant returned a call to Facilities Manager Suzi LaTona to get an update about a steam pipe meeting he had missed. Ms. LaTona asked Appellant how he was doing. A conversation she expected to take five minutes then consumed 20 to 30 minutes, with Appellant doing most of the talking. Appellant angrily accused management of destroying his career, and said he thought he was about to be disciplined again. [LaTona, 2/29/12, 4:01 pm.] Ms. LaTona was so concerned about the conversation that she sent an email documenting it in detail to CSA HR officials a few days later. 4 Therein, Ms. LaTona related that Appellant told her he “has to take a fist full of medication just to get himself to work everyday.” He complained that his career was being sabotaged and Ms. Thomas had ruined his reputation. He said that “now he had nothing left to lose and nothing left to live for”, adding, “none of this even matters anymore.” [Exh. 14.] He claimed Ms. Thomas, Mr. Scholz and Mr. Steinberg were responsible for the damage done to his career and reputation.

He went on about how they are all back-stabbing him and ruining his life . . . Making him the scapegoat for everything that has gone wrong and continually setting him up to fail. He talked about going to Westword and telling his story because it needed to be told. Saying everyone needs to know what ‘they’ have done to him. He said that’s not over either . . . He talked about his lawyer writing up a letter this weekend.

[Exh. 14.]

Appellant conceded that he did make the above statements. [Appellant, 5/31/12, 9:33 am.] Other evidence corroborated the fact that Appellant expressed his frustration with the 2010 investigative leave and with management in general to persons inside and outside the Agency. Mr. Forvilly, who reported to Appellant, confirmed that Appellant told him he still did not know what he did to cause the 2010 investigative leave. [Exh. 13-3.] Appellant told Mr. Sheehan that he informed Councilman Nevitt in May 2011 “what happened last year and how I was sent home and didn’t know why.” [Exh. 13-20.] Appellant also admitted discussing these past issues with Administrative Assistants Corinna Lujan and Patti Abeyta Chism. [Appellant, 5/2/12, 3:44 pm; Exh. 9-7.]

E. Decision to Terminate Appellant

Interim Manager of Public Works George Delaney made the disciplinary decision in consultation with Mr. Kumar, Ms. Stuber, and Ms. Thomas. Investigator Kathy Billings also attended to pre-disciplinary meeting. The panel found based on the investigation that Appellant had engaged in a pattern of intimidating conduct that made fellow employees uncomfortable, and resulted in requests to restrict Appellant from working with the Department of Finance (DOF) and Jacobs Engineering. [Delaney, 3/1/12, 3:28 pm.] Although they did not find that Appellant made any overt threats, the decision-makers found that Appellant had angrily confronted several employees within a short period of time, causing employees and contractors to become concerned about their own safety when with Appellant. [Delaney, 3/1/12, 3:34 pm; Exhs. 13-59 – 61; 14; 15; 17.]

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4 The July 19th date stated in the email was an error, as Ms. LaTona testified that the conversation actually occurred a day or two before July 14th, 2011. [LaTona, 2/29/12, 4:10 pm.]
Mr. Delaney was aware that Appellant had been placed on investigative leave in 2010 based on previous reports of disconcerting conduct by Appellant. He was also familiar with Appellant's July 2010 discipline for pushing Ms. Hollrah within a few months of his return from that leave. He weighed heavily the request of Chief Financial Officer Ed Scholz to reassign Appellant "to ensure that he does not come into contact with any DOF staff", as well as Jacobs Engineering request to be notified if Appellant was returned to work so it may take steps to prevent "any contact between Mr. Luxa and the Jacobs staff." [Exhs. 15, 17.] The panel considered alternative discipline, including an extended period of leave without pay, demotion, or a reduction in pay. However, Mr. Delaney and the disciplinary panel rejected those alternatives because of the "reasonable probability" that this behavior would continue, and because Appellant's job in capital projects required him to work closely with capital budget analysts within DOF for approval, reporting and tracking of project funds. Thus, DOF's June 2011 request to restrict Appellant from any contact with its staff caused Mr. Delaney to doubt that Appellant would be able to do his job under those circumstances. [Delaney, 3/1/12, 3:28 pm.]

Initially, Mr. Kumar believed strongly that Appellant could be brought back to work and given the tools he needed to do his job, and he communicated this belief to Ms. Stuber and his managers. Ultimately, he relied on CSA's investigative findings and his managers' opinions that Appellant could not be returned to work given the complaints and overall environment created by Appellant's conduct. Mr. Kumar then concurred that termination was the appropriate penalty. As Appellant's supervisor, Mr. Kumar was delegated the authority to sign the termination letter on behalf of the Agency. [Kumar, 4/16/12; Exh. 2.]

IV. ANALYSIS

The Agency bears the burden to prove by a preponderance of the evidence the conduct stated in the disciplinary letter, and that this conduct violates the Career Service Rules cited in the disciplinary action. The Agency must also establish that dismissal was within the range of discipline that can be imposed by a reasonable administrator based on the proven violations and Appellant's employment and disciplinary history. In re Gustern, CSA 128-02, 20 (12/23/02); Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975); CSR § 16-20.

A. Asserted Violations of Disciplinary Rules

1. Neglect of Duty under § 16-60 A.

The Agency argues that Appellant failed to perform his duties to act professionally and refrain from threats and intimidation. [Agency Closing, 14.] Appellant has admitted that his actions were "less than professional" in certain respects.

As we have held in the past, not every quality or trait mentioned in a job description is an affirmative job duty enforceable under the disciplinary rules. In re Purdy, CSA 67-11, 10 (7/16/12.) Here, the performance standards cited in the disciplinary letter do not charge Appellant with the duty to act professionally. [Exh. 2.] The phrase "act professionally" is ill-suited to set forth a job duty, since its interpretation may vary considerably depending on several factors, including the profession at issue and the specific employment context. The Agency does not identify either the source of the duty to act professionally or the specific conduct it determined violated that duty. Similarly, the
Agency has not identified any evidence from which I can conclude that "refrain[ing] from threats and intimidation" is a specific job duty of the job of Manager 1.5

Without specific allegations supporting both the existence of these claimed duties and identifying the misconduct violating them, the Agency has failed to prove that Appellant neglected any duty.

2. Carelessness in the performance of duties under § 16-60 B.

An employee is careless in the performance of duties if he acts heedlessly of an important work duty, resulting in potential or actual significant harm. In re Mounjim, CSA 87-07, 5 (7/10/08), rev’d on other grounds.

The Agency contends that Appellant was careless in performing the same duties as above: the duty to act professionally and avoid threats and intimidation. The evidence does not show that those matters were specific duties, or that Appellant’s actions constituted carelessness in the performance of those duties. Thus, this charge is not proven.

3. Failure to comply with lawful orders under CSR § 16-60 J.

An employee violates this rule by willfully failing to obey a reasonable order. In re Sawyer and Sproul, CSA 33-08, 9 (1/27/09). An order within the meaning of this rule is a clear instruction to take or avoid specific actions rather than a mere statement of a general standard of conduct. In re Purdy, supra.

The Agency argues that Appellant failed to obey Mr. Kumar’s lawful orders contained in the June 2010 Letter of Instruction. The letter told Appellant to "exercise restraint from emotional outbursts, and avoid character attacks and bringing up issues from the past." [Exh. 7-6.] Mr. Kumar testified that the latter phrase was intended to order Appellant not to discuss his work disputes or frustrations with others. After Appellant’s return to work in July 2010, Mr. Kumar counseled him on a daily basis about how to communicate with others and handle his work stress, and repeated his order that he was not to share internal disputes with the Agency’s shareholders or agency clients. Appellant testified that he understood what was expected of him with regard to tactful communications and avoiding friction with others. [Appellant, 5/2/12, 3:03 pm.] He was aware as early as the Monday following the April 2010 Gala that his lengthy emotional phone call to Ms. Dula complaining about his treatment by management was inappropriate, and acknowledged that fact by his sincere apology to her for the call.

The Agency presented evidence that Appellant complained to Facilities Manager Suzi LaTona that Ms. Thomas, Mr. Scholz and Mr. Steinberg had destroyed his career and ruined his reputation by backstabbing him and setting him up to fail. Facilities Management is a division of the city’s General Services Department. Therefore, Ms. LaTona was an outside agency client. Appellant admitted that he made the statements reported by Ms. LaTona. I find that Appellant’s complaints to Ms. LaTona did violate Mr. Kumar’s clear and reasonable order to refrain from discussing his internal disputes with outside stakeholders.

5 Mr. Kumar believed the neglect at issue was Appellant’s 2010 failure to respond to business emails. [Kumar, 4/16/12.] The disciplinary letters did not include the fact supporting that allegation, and there was no evidence presented on that argument.
4. Failing to meet established standards of performance under § 16-60 K.

An employee violates this rule when the agency clearly communicates a standard of performance, and the employee fails to meet that standard. In re Bernal, CSA 54-10, 11 (3/11/11). The disciplinary letter cited language from Appellant’s 2010 Performance Enhancement Plan (PEP) in the areas of information management, leadership, policy compliance, and communication.

The Agency claims that the following excerpts from Appellant’s PEP state the performance standards he violated:

**Information Management:** Provides regular communication to subordinate staff and higher-level managers. Responds to subordinate’s inquiries, provides guidance and interpretation. Discusses and resolves day-to-day issues. Seeks information, clarification, approvals and actions from higher-level managers. Explains and defends the organization’s decisions, actions and recommendations to others internally and externally. Helps resolve differences among subordinate supervisors.

**Leadership:** Coaches, mentors and challenges subordinate supervisors. Actively engages staff to get support and commitment. Models City values and ethics.

**Compliance:** Recommends and presents justification for policies and procedures. Directs development and provides approval of work-level practices and procedures for daily operations. Provides training for implementation and compliance with new policies, procedures, rules and regulations. Implements and maintains policies and procedures created by higher-level executives and other policy-making entities.

**Communication:** Communication is frequent, focused and positively represents the agency. Maintains positive communications and feedback with peers, co-workers, customers and supervisory staff. Achieves a high level of performance in support of departmental, agency and team goals. Actions and decisions display high standards of personal conduct toward job duties, citizens, co-workers, supervisors and managers and the administration. Communication is well managed and timely.

[Exhs. 2; T-1.]

The above are portions of the PEP section that lists “the formal duties for this job classification” in the areas of information management, leadership, and policy compliance, and excerpts from the “outcomes” section for communication. [Exh. T-1, T-2.]

The disciplinary letter does not allege that Appellant failed to perform his job duties. The Agency argues instead that Appellant’s anger and preoccupation with his own professional grievances caused others to avoid communication with him, and that as a result Appellant was unable to effectively lead the Major Projects Office. The Agency supported this argument by the testimony of Ms. Przywitowski, Ms. LaTona and Mr. Gillet, and statements
from Ms. Hollrah, Mr. Kumar, and Mr. Scholz. All related that Appellant confronted them inappropriately during incidents generally described in the disciplinary letter. Mr. Kumar immediately asked Appellant to acknowledge and apologize for the misconduct directed at him, and Appellant did so. As a result, the employee/supervisor relationship between Appellant and Mr. Kumar continued to be functional and positive. In contrast, Ms. Przywitowski, Mr. Gillet, Ms. Hollrah and Mr. Scholz lacked supervisory authority over Appellant, and reacted to the incidents by seeking to avoid working with him in the future.

The Agency has not pointed to any specific sentence in the above performance duties or standards that prohibit the conduct described in the disciplinary letter, and the evidence does not readily reveal what the Agency may mean by its argument. As the Agency has the burden to establish each disciplinary violation, I must find that it did not prove Appellant's conduct failed to meet any of the above performance standards.

5. Threatening, intimidating or abusing employees under § 16-60 M.

A threat is a statement reasonably understood to indicate an intent to inflict harm or loss on another or his property. In re Harrison, CSA 55-07, 50 (6/17/10); In re Katros, CSA 129-04, 8 (3/16/05). Intimidation is an unlawful threat intended to coerce another. In re D'Ambrosio, CSA 98-09, 8 (5/7/10). Abuse means harsh treatment, insults, or coarse language directed at another employee. In re Owens, CSA 69-08, 6 (2/6/09). Mere expressions of anger are not abuse under this rule. In re Harrison, supra.

The Agency argues that Appellant's conduct toward Ms. Hollrah, Ms. Thomas and Ms. Przywitowski violated this rule. Ms. Hollrah described Appellant's conduct on April 27th as hostile and unacceptable, rather than threatening, intimidating, or abusive. The disciplinary letter gave no notice that the Agency was claiming that Appellant threatened, intimidated or abused Ms. Thomas. On the other hand, Ms. Przywitowski testified that she felt intimidated when Appellant approached her angrily on June 28th, and felt professionally threatened by Appellant's statement that she was not allowed to speak to her own supervisor or his staff, contrary to her departmental practice. I find that Appellant did physically intimidate Ms. Przywitowski by his loud and angry approach, his insistence that she enter an empty office with him, and his insulting statement that she pulled information "out of her ass." Under these circumstances, the Agency proved that Appellant intimidated Ms. Przywitowski, in violation of this rule.

6. Failure to maintain satisfactory work relationships under § 16-60 O.

This rule is violated by conduct an employee knows or reasonably should know will harm or significantly impact a working relationship. In re Burghardt, CSA 81-07, 2 (CSB 8/28/08).

The Agency argues here that Appellant's improper conduct over five months led to several co-worker complaints and requests to remove Appellant from contact with the complainants, proving that the behavior seriously and negatively affected their working relationship. It relies on each of the events described in the disciplinary letter.

As to the Alson incident, the evidence is undisputed that Appellant was exasperated with his direct report during a supervisory meeting, and engaged in a loud and angry exchange. He then publicly censured Mr. Alson by writing his position on the board and leaving it there well after the meeting concluded. Appellant has admitted that his conference with his subordinate Robert Alson was "very heated on both ends." His shocked
comment, "[h]ave you lost your capability to be a PM?", shows that his written comment was intended in part as an attack on Mr. Alson's competence. This gives context to the statement that was otherwise simply factual: that Mr. Alson told Appellant he did not think he was required to sign monthly construction pay applications. Appellant explained that he wrote it down to prevent game-playing and document Mr. Alson's stated position. The fact that it was left there for days and that others saw it is persuasive evidence that Appellant intended it to be public criticism of his subordinate's performance. There was no evidence supporting a contrary interpretation of the incident. In addition, Mr. Alson felt demeaned by the comment on the board, and complained to CSA that Appellant had bullied him. Although the investigator did not sustain that charge, she found that Appellant's conduct was unprofessional. [Stuber, 5/31/12, 11:09 am.]

Thus, the Agency proved that Appellant engaged in angry and demeaning behavior toward his subordinate, contrary to his obligation to model the city values of service, teamwork and respect in performing his supervisory duties. That unprofessional conduct resulted in significant harm to the working relationship between Appellant and Mr. Alson, as shown by Mr. Alson's complaint of bullying against his supervisor.

The second incident involved Appellant's heated disagreement with Ms. Hollrah after a bond meeting on April 27, 2011. Ms. Hollrah immediately reported the matter to Chief Financial Officer Ed Scholz, who requested a CSA investigation. [Mischo Quintana, 2/29/12, 4:28 pm.] In her statement during the investigation, Ms. Hollrah described Appellant as "enraged" and "focused on describing a continuing conspiracy theory... I'm at a point where I'm very uncomfortable with his behavior and am unable to maintain an effective working relationship with him." [Exh. 13-35.] Appellant had been disciplined less than a year earlier for twice pushing Ms. Hollrah off balance. Shortly after the April 2011 incident, Mr. Scholz asked Public Works through CSA to ensure that Appellant "does not come into contact with any DOF staff", which would require the Agency to adjust Appellant's work assignment "[a]s these employees are part of larger, cross-departmental working groups and committees that are necessary for them to complete their work." [Exh. 15.]

Appellant admitted that his behavior was unprofessional, and does not deny that Ms. Hollrah's reaction was reasonable given his prior physical assault on her. It is also undisputed that Appellant's exclusion from contact with anyone in the Finance Department would handicap him in running the Major Projects Office, given finance's critical role in the approval, reporting and tracking of funds for capital projects. The Agency established that Appellant failed to maintain a satisfactory working relationship with Ms. Hollrah as a result of this episode.

Third, the Agency highlights two incidents involving Ms. Przywitowski: Appellant's May instruction to her not to report project problems to her supervisor, and their June confrontation on the 6th floor. During both, Ms. Przywitowski felt she was being criticized for taking required action; i.e., discussing her work with her supervisor. She felt so uneasy after the May discussion that she reported the matter to Mr. Steinberg. Mr. Steinberg in turn emailed Mr. Delaney and Ms. Thomas to ask them to assign a Project Manager other than Appellant for Real Estate projects. [Exh. 13-60.] After their June meeting, Ms. Przywitowski tearfully told Mr. Steinberg that she felt threatened, intimidated and fearful of working with Appellant in any capacity. . [Przywitowski, 2/29/12, 2:03 pm; Exh. 13-59.] Two days later, Mr. Steinberg gave CSA his own statement about this and other uncomfortable interactions he had had with Appellant. [Steinberg, 2/29/12, 2:58 pm; Exhs. 13-60 to 13-61.]
Appellant admitted he was angry during his June meeting with Ms. Przywitowski, and that he accused her of pulling information "out of her ass". It was reasonable for an employee on the receiving end of this tense confrontation to feel intimidated and afraid to continue working with Appellant, and reasonable for her supervisor to support that request. [Exh. 13-60.] The evidence established that Appellant failed to maintain a satisfactory work relationship with Ms. Przywitowski based on this incident.

The fourth incident related to Appellant’s disrespectful behavior toward his supervisor Mr. Kumar during a June interagency meeting on the Arie P. Taylor project. Although Mr. Steinberg from the Real Estate division was “appalled at his behavior”, Mr. Kumar simply met with Appellant privately after the meeting and asked him to acknowledge and apologize for the misconduct. Both men testified that the apology resolved the issue for them both, and that their relationship remained positive. This incident therefore did not prove a violation of this rule.

Fifth and finally as to this rule, Facilities Manager Suzi LaTona testified about her July phone call with Appellant which caused her to become concerned about Appellant. During that call, Appellant angrily complained that Ms. Thomas, Mr. Scholz and Mr. Steinberg had set him up to fail and had ruined his career and his reputation. He stated he was going to Westword to tell his story, adding "that's not over either." Ms. LaTona recognized that Appellant had always been animated, and stated, "I didn't see any reason to think he was a threat to them." [LaTona, 2/29/12, 4:16 pm.] The next day, Appellant was placed on investigatory leave, and was thereafter terminated without returning to the workplace. There was no evidence that anyone at the Agency experienced fear or an unwillingness to work with Appellant after learning of this phone conversation. Under these circumstances, the Agency did not prove that Appellant's conduct caused a failure to maintain a satisfactory work relationship with Ms. LaTona.

In sum, the Agency proved that Appellant failed to maintain satisfactory working relationships with Mr. Alson, Ms. Hollrah and Ms. Przywitowski.

7. Conduct violating Executive Order 112 under CSR 16-60 Y

The Department asserts that Appellant violated Executive Order 112 by threats, intimidation or abuse of Ms. Hollrah, Ms. Przywitowski and Ms. Thomas.

As found above with regard to the allegation under § 16-60 M, the Agency did not describe any threats, intimidation or abuse of Ms. Thomas. Appellant’s emotional complaints to Ms. Hollrah ended with the latter simply walking away. Ms. Hollrah did not testify in this hearing, and so there is no evidence to support a finding that she felt threatened, intimidated or abused.

In contrast, Ms. Przywitowski testified that Appellant did intimidate her by his behavior, including stomping, pointing and waving his arms during his angry approach in the hallway, followed by his loud accusation that "you got me in trouble!" [Przywitowski, 2/29/12, 2:03 pm; Exh. 13-59.] His immediate insistence that she go with him into an empty office, where he accused her of pulling information "out of her ass," fueled her trepidation during the emotionally intense encounter. She immediately reported the incident and her fear of Appellant to her supervisor, who took prompt action to protect her from Appellant. Under these circumstances, the Agency proved that Appellant intimidated and abused Ms. Przywitowski, in violation of this rule.
8. Conduct prejudicial to good order of agency under CSR 16-60 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" violates § 16-60 Z. In re Koehler, CSA 113-09, 17 {4/29/10.) The Agency argues in its closing that Appellant hindered the Agency's relations both inside and outside the City, presumably by actions that caused the Real Estate Division, the Department of Finance and City contractor Jacobs Engineering to seek protection from further contact with Appellant.

Appellant's conduct toward Ms. Przywitowski of the Real Estate Division caused her to feel intimidated and fearful of professional consequences, since Appellant had become enraged and had ordered her not to follow her chain of command for the space planning project. [Exh. 13-60.] As a result, Mr. Steinberg asked Ms. Thomas to assign a different Project Manager. The day before, Chief Financial Officer Ed Scholz made a similar request based on his employees' complaints that they were frightened of Appellant. As found above, there was evidence that Appellant behaved unprofessionally toward one DOF employee, Ms. Hollrah. However, Appellant was placed on investigative leave six weeks later, and never returned to the workplace. The Agency presented no testimony that the Agency's ability to carry out its mission was hindered as a result of either of these incidents, or that the City's reputation or integrity was damaged by Appellant's conduct toward Ms. Przywitowski or Ms. Hollrah.

About a month after Appellant had been placed on leave, Jacobs Engineering sent Mr. Delaney a letter noting that "Mr. Gillet had directed the Jacobs staff not to interact with Mr. Luxa and not to enter his office. Mr. Gillet also requested that Michael Sheehan replace Mr. Luxa as Jacobs' client contact with CCD." Citing "hostile and intimidating behaviors toward the Jacobs team members," Jacobs' Regional Manager then requested prior notice and implementation of safety measures for their employees if Appellant was going to be returned to their common office in the Webb Municipal Office Building. [Exh. 17.] However, the disciplinary letter gave Appellant no notice of any specific misconduct between himself and Jacobs employees. Appellant's phone call to Ms. Dula occurred in April 2010, and is thus outside the purview of this discipline. Moreover, there is no evidence that the Agency was harmed in its ability to perform its mission, or that the City suffered any damage to its reputation or integrity by virtue of any conduct asserted in the disciplinary letter. This violation was not proven.

B. Appropriateness of Termination as Penalty

The level of discipline imposed by an agency must not be disturbed unless clearly excessive or not supported by substantial evidence. In re Owens, CSA 69-08, 8 (2/6/09). In evaluating the proper degree of discipline under the Career Service Rules, an agency must consider the severity of the offense, an employee's past disciplinary record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20; In re Norman-Curry, CSA 28-07, 23 (2/27/09). The reasonableness of discipline is determined by the facts of each case. See In re Paz, CSA 07-09A, 2 (CSB 1/21/10).

Appellant first argues that the Agency failed to consider Appellant's letter of response to the pre-disciplinary letter. [Exh. 18.] That response contained no specific rebuttal to the allegations made in the Agency's letter. In any event, the hearing provided Appellant with a full opportunity to respond to and rebut the Agency's charges, cross-examine witnesses, and argue all issues in this appeal. I find that Appellant was not denied due process, including
the opportunity to respond to the allegations made against him, either at the pre-disciplinary 
meeting or at the hearing on this appeal.

Appellant also contends that termination was excessive based on his exemplary 
performance for the previous 12 years, during which he incurred only one minor disciplinary 
action. [Exh. 9.] Since the discipline is based on behavioral rather than performance issues, 
his prior exemplary performance of his duties does not rebut the charges but is merely one 
factor to be considered in the penalty determination.

Appellant argues that the seriousness of his conduct was mitigated by the Agency’s 
actions in stripping him of his managerial duties and damaging his reputation by placing him 
on investigative leave for 72 days in 2010. Appellant does not contend that his prior non- 
disciplinary investigatory leave was imposed in violation of CSR § 16-30. That rule does not 
require that the reasons for an investigatory leave must be communicated to an employee. 
The rule states merely that an appointing authority may place an employee on paid 
investigatory leave if it determined that the leave “is in the best interest of the City.” 
Appellant was informed about the general nature of the “disconcerting interactions” 
referred to in the leave letter, including a report that he became tearful when asked a 
routine question by co-workers, that he wore sunglasses during an evening event, and that 
he engaged in a long and emotional phone call to Ms. Dula while at the Gala. Appellant 
responded by stating he did not believe these were the real reasons for the leave. In any 
event, Appellant was on notice of the type of behavior that led to the Agency’s concerns 
about his fitness for duty.

Appellant presented no evidence that his reputation was harmed by the leave. On 
the contrary, the evidence indicated that Appellant himself was the only person who 
continued to discuss it in the workplace, including at managers’ meetings. Appellant was not 
disciplined or demoted, and the changes to his assignments were justified by organizational 
changes made during the period of his leave. Appellant conceded that the Agency’s 
reduction to his workload when he returned to work was appropriate, and that he benefitted 
from that reduction.

In addition, Appellant failed to pursue his available remedies under the Career Service 
Rules to challenge these past Agency actions. Instead, Appellant complained at length of ill- 
treatment to co-workers, in violation of both his role as a high-level manager and Mr. Kumar’s 
order to refrain from focusing on past grievances. Appellant cannot belatedly challenge 
the 2010 leave by claiming it as partial justification for his misconduct when he failed to use 
internal procedures to contest it, and the evidence does not show the Agency acted outside 
the rules in imposing the investigative leave.

Appellant argues that termination was too severe in light of his efforts to seek 
professional help to deal with stress and his pledge to do all in his power to improve his 
working relationships. This argument is undermined by Appellant’s testimony that he “may 
have made that same promise in 2010; I think I kept that promise.” [Appellant, 5/31/12, 8:59 
am.] His written reprimand and later employee complaints indicate otherwise. Appellant 
limited his contrition by stating only that he “could have handled some situations better”, 
including those with Ms. Hollrah and Ms. Przywitowski, with whom he acknowledged he had 
been “less than professional.” His testimony showed he failed to appreciate the full 
consequences of his misconduct: co-workers’ fear of his outbursts, several requests to avoid 
future contact with him, and the negative effect on the Agency’s work caused by those 
damaged relationships. Appellant believed that his participation in CSA’s “Crucial 
Conversations” course would improve his behavior. However, Appellant completed that
course in the spring of 2010, and all of the incidents in the disciplinary letter occurred thereafter. [Exh. 7-1.]

Appellant argued that an alternative short of termination was readily available but ignored by the Agency. He claims Mr. Delany refused to transfer him in January 2011 despite the willingness of Dan Roberts, director of another agency, to hire him. However, Appellant did not rebut Mr. Delaney’s testimony that the position mentioned was not funded, and the upcoming mayoral transition rendered even Mr. Roberts’ reappointment uncertain. [Delaney, 3/1/12, 4:07 pm.]

The Agency supported its penalty determination with convincing evidence that Appellant had received daily supportive counseling from Mr. Kumar, and unmistakable warnings about the type of misconduct that would place him at risk of more serious discipline, including termination. [Exhs. 7, 9, 10-1, 10-2.] Appellant’s position required teamwork and high level communication skills with co-workers, stakeholders, and management to get major city projects accomplished. By degrees, Appellant’s failure to exercise those skills caused the Agency to remove him from assignments at the request of co-workers and stakeholders. Appellant was given the benefit of several techniques intended to correct his conduct: a lengthy investigative leave, costly organizational and communications training, a significant reduction in duties, a detailed transition plan, a period of observation with a patient and supportive supervisor in the person of Mr. Kumar, and frequent reminders to avoid “bringing up issues from the past”. Nonetheless, two months after his return, Appellant was disciplined for pushing a fellow employee while complaining about his treatment by management. Appellant continued to openly criticize management during high level meetings. Eight months later, the pace of employee complaints over the same type of conduct increased. Based on Appellant’s continued focus on blaming others for his misconduct, the Agency reasonably concluded that Appellant’s unacceptable behavior would continue, to the detriment of the Agency’s performance of its critical capital projects function. On the evidence, the termination action was well within the range of penalties reasonable administrators could impose.

C. Retaliation Claims

“Retaliation against employees for reporting unlawful harassment or discrimination or assisting the City in the investigation of any complaint is against the law and will not be permitted.” CSR § 15-106. Although the word “complaint” is not specifically defined within that rule, its placement within the section entitled “Harassment and/or Discrimination” makes it clear that it is intended to prohibit retaliation for assisting in an investigation into a complaint of unlawful harassment or discrimination. CSR § 15-100 et. seq. An appellant bears the burden to prove that he engaged in a protected activity, and that a later adverse employment action was motivated by a desire to retaliate against him for that activity. In re Gallo, CSA 63-09, 3 (CSB 3/17/11).

Appellant argues that the Agency retaliated against him for three separate protected activities: 1) his January 2011 investigative interview in support of the bullying complaint against Ms. Thomas; 2) his statements published in the July 2011 Westword; and 3) the July 2011 Notice of Intent to Sue.

6 CSR Rule 18 Dispute Resolution provides a separate procedure for resolving work-related issues not asserting discrimination.
1. Jan. 2011 Investigative Interview on Bullying Complaint

In late December, Human Resources asked Appellant to participate in its investigation into an allegation of workplace bullying against Ms. Thomas. The investigation was initiated as a result of an anonymous complaint that Ms. Thomas' intimidating conduct during meetings caused a culture of bullying and abuse within the Department. That asserted conduct included tirades against employees and body language perceived to be critical: "how she positions herself and glares un-blinkingly at her chosen victim. . . . [w]e are in fear of losing our jobs if any one of us voices concerns about her behavior." [Exh. G-4.] The complaint does not allege a discriminatory motive for the bullying conduct, but rather a general mistreatment of subordinate employees. Thus, the underlying complaint was about unfavorable conditions of employment rather than discrimination or harassment on a protected basis.

During his interview in support of the bullying allegation, Appellant described Ms. Thomas' behavior during meetings:

[Exh. I-3.]

Appellant also described several of his own complaints about Ms. Thomas. Those included Ms. Thomas' refusal since the spring of 2009 to discuss her ideas with him or to give him the information and authority to work on the Justice Center project. Appellant added that Ms. Thomas delayed issuance of his PEPRs and refused to hire two qualified employees. Finally, Appellant claimed that he "should have never been put on [investigative leave]" in 2011, and that his return to work was delayed because Ms. Thomas "wanted Mike [Sheehan] and wanted me to resign." [Exh. I.-6.] The interview does not allege that Appellant or others were treated unfavorably based on their membership in a protected class. Thus, it cannot be considered a protected activity under the rule barring retaliation for reporting unlawful harassment or discrimination.

A month after Appellant's interview by CSA, Ms. Thomas instructed Appellant not to speak with her directly, and to route all communications to her through Mr. Kumar. [Appellant, 5/2/12, 11:37 am; Exh. KK.] On April 15, 2011, Ms. Thomas was served with a letter advising her that the bullying investigation found she had demonstrated inappropriate and unprofessional behavior towards employees, including Mr. Kumar. [Exh. J.] That same day, Appellant was given his annual performance review with an overall successful rating, which included seven below expectations ratings in individual categories. [Exh. T.] The previous year, Appellant had received the same rating, with only one below expectations rating in a priority two goal. [Exh. V.] Both PEPRs were prepared by Mr. Kumar, who conceded that Ms. Thomas' input into the more recent PEPR resulted in changes to some of the ratings. [Kumar, 6/18/12, 10:10 am.] Appellant did not file a timely grievance or appeal of the PEPR rating as either retaliation or a violation of the whistleblower ordinance.

In any event, the fact that Appellant's interview was not a protected activity is dispositive on the issue of this retaliation claim, irrespective of the consequences of the investigation and the Agency's later actions against Appellant.
2. Allegations of Unfair Investigatory Leave Published in Jul. 2011 Westword Article

Appellant next claims that his August 31, 2011 termination was motivated by a desire to penalize him for his participation in the local monthly journal Westword article published on July 8, 2011. That edition published an in-depth article critical of Denver’s Career Service Authority, "the agency that handles human resources for most city employees." [Exh. AA-1.] Within days, many employees at Public Works had heard about the article.

Information from Appellant consumed a significant portion of the headline article. Although his name was not used, the source of the information was described as "a manager in the Department of Public Works... still on the job, no thanks to the CSA." [Exh. AA-5.] Substantial and believable evidence supports a finding that the Agency knew Appellant was the manager quoted in the article before it took the termination action. The article noted that the manager was placed on investigatory leave in April 2010 based on complaints of “inappropriate and discourteous interactions” with various persons over the past few weeks, but was not returned to work despite being cleared by a mandatory fitness for duty examination. Appellant, speaking anonymously, blamed Public Work’s Human Resources director for that delay. The article continued that the manager still doesn’t know why he was ever put on leave, though he has a hunch it had to do with friction he was experiencing with his supervisors over changes in his department. Then again, he was also the first person to confront City Engineer Lesley Thomas, who’s right under the director of Public Works in the department hierarchy, with the fact that her professional engineering license had expired – a lapse that would make headlines two years later. Whatever the reason for the unexplained and costly leave, ... Career Service should have stepped in from the beginning."

[Exh. AA-5.]

Appellant does not argue that his termination was caused by either friction with his supervisors or his confrontation with Ms. Thomas over her expired license. He argues instead that his dismissal was retaliation for his reported statements about CSA’s failure to assist him in his complaints about management. [Appellant’s Closing, 26.] The allegations made in the Westword article included some of the same issues Appellant raised in his January CSA interview: that he was not told what misconduct led to his 2010 investigatory leave, and that the leave was extended well after he had been cleared for return to duty. These are complaints about unfavorable personnel actions, which are not protected activities unless taken as a result of discrimination or harassment. In re Jackson, 103-04, 7 (6/13/05); Durkin v. City of Chicago, 341 F.3d 606. 615 (7th Cir. 2003) (complaints about "subject matters other than harassment" are not protected activities). Mr. Delaney admitted he knew before making the disciplinary decision that Appellant had spoken with the Auditor’s Office. [Delaney, 3/1/12, 11:41 am.] However, his complaint to the Auditor was about his

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7 Appellant was recognized by his co-workers as the person quoted in the article based on his description as a Public Works manager placed on investigatory leave in April 2010 for inappropriate conduct, and numerous details mentioned in the article from Appellant’s career history. The article quoted almost exactly from his investigative leave letter. [Exhs. S; AA-5.] In addition, Appellant openly told Ms. LaTona and others that he was going to Westword to tell his story, and that he would like to see the Denver Post and 9News do the story. [Appellant, S/2/12, 5:05 pm.]
investigative leave, and contained no allegation of discrimination. Likewise, Appellant's cooperation with the bullying investigation related to a complaint over working conditions rather than a discrimination or harassment claim. Therefore, Appellant's participation in the Westword article was not protected from retaliation under § 15-106.

3. July 2011 Notice of Intent to Sue

Finally as to the retaliation claim, Appellant contends his attorney's Notice of Right to Sue was a protected activity which led to his termination the following month. The notice informed Mayor Michael B. Hancock that Appellant intended to file suit based on Ms. Thomas' workplace bullying from Jan. 2009 to the present. [Exh. N.] The letter does not allege that the reason for the bullying involved discrimination or harassment for his membership in a protected class, and therefore is not evidence that Appellant engaged in a protected activity, a necessary element to prove a claim of retaliation under § 15-106. Id.

Since Appellant did not establish a prima facie case on his claim of retaliation, the burden never shifted to the Agency to show that it had a legitimate, nondiscriminatory reason for the adverse action. In re Williams, CSA 65-05, 8 (11/17/05); Poe v. Shari's Mgmt Corp., 1999 US App. LEXIS 17905 (10th Cir. 1999).

D. Whistleblower Claims

The Whistleblower Protection Ordinance prohibits adverse employment action motivated by an employee's report of official misconduct. Official misconduct is an act or omission that is a violation of law, applicable rule, regulation or executive order, ethics rules and standards, waste of city funds, or abuse of official authority. D.R.M.C. § 2-107 (d); In re Wehmhoefer, CSA 02-08, 4-5 (2/14/08). Appellant bears the burden to establish his whistleblower claim. In re Gallo, CSA 63-09, 3 (CSB 3/17/11); Taylor v. Regents of University of Colorado, 179 P.3d 246 (Colo.App. 2007).

Appellant argues that the same actions cited above in his retaliation claims also prove that he reported official misconduct. Three separate protected activities are asserted: 1) his January 2011 interview in support of the bullying complaint against Ms. Thomas; 2) his July 2011 Westword interview; and 3) his July 2011 Notice of Intent to Sue.

As noted above on the claim of retaliation, Appellant's statements made three claims during these asserted reports of official misconduct: 1) that Ms. Thomas bullied him, 2) that his investigative leave was imposed without cause, and 3) that his return from investigative leave was improperly delayed.

Appellant contends that his support of the bullying complaint was protected as a disclosure of official misconduct based on the city's zero tolerance for workplace violence under Executive Order 112. That order defines violence in relevant part as "the actual or attempted: threatening behavior, verbal abuse, intimidation, [and] harassment", requiring an employee who becomes aware of it to immediately report it to a supervisor. Executive Order 112, §§ 3.0(b); 5.0(b). Violent actions are those that may subject an employee to discipline if performed in a violent manner. In re D'Ambrosio, CSA 98-09, 10 (5/7/10).

A fact-finder must examine the totality of the circumstances to determine if an action is violent as that term is used in Executive Order 112. In re Owens, CSA 69-08, 6 (2/6/09). For a number of reasons, I find the evidence does not support Appellant's claim that he reasonably believed the Agency's actions on the bullying complaint constituted official misconduct.
First, the facts reported are objectively insufficient to sustain a claim of workplace violence. The words and actions alleged – that Ms. Thomas got frustrated, crossed her arms, frowned and shook her head - indicate mild disapproval or disagreement by Ms. Thomas, actions not inconsistent with her supervisory role in administering this technical and demanding arena within the Agency. [Exh. I-3.] Such actions are not the type of harsh, insulting or coarse treatment intended to define abuse under the workplace violence policy. See In re D'Ambrosio, CSA 98-09, 10 (5/7/10). Appellant himself conceded that a supervisor's corrections are not bullying, and admitted he was not bullied by Ms. Thomas. [Appellant, 5/31/12, 9:47 am.] Finally, Appellant did not view it as violent behavior at the time it occurred, since he did not report it to his supervisor as required by Executive Order 112.

As to his claim that the Agency's actions during his investigative leave were official misconduct, Appellant claims only that he had not been told the reasons for the investigative leave. While the 2010 leave is not directly at issue in this appeal, the testimony of Mr. Kumar, Mr. Miles and Ms. Thomas amply supports the Agency's action in placing Appellant on leave based on the circumstances known to them at the time. Appellant does not argue that the leave violated § 16-30, the rule governing investigative leave. The fact that the leave issue was reported to the Auditor's Office did not transform it into a report of official misconduct.

Appellant argues that he reported the leave as a waste of city assets under the whistleblower ordinance by informing Westword that the delay in his return from paid leave was expensive to the city. However, Appellant did not present evidence that he told Westword or the Auditor's Office that the leave itself was imposed in violation of any applicable rules, or was otherwise improper. Since the cost of leave is not wasteful unless the leave itself was improper, the evidence does not support a finding that Appellant reasonably believed his paid investigative leave was a misuse of city funds.

The final claimed report is the July Notice of Intent to Sue. As found above, that notice alleges only a bullying complaint against Ms. Thomas. Appellant raises no argument that the asserted bullying was itself official misconduct or was taken in retaliation for a report of official misconduct.

As noted in other decisions, Denver's whistleblower ordinance "was intended to mesh well with the state whistleblower law", and therefore Colorado decisions are "persuasive authority in construing the intended meaning of the ordinance." In re Harrison, CSA 55-07, 59-60 (6/17/10). The Colorado Court of Appeals has rejected the argument that "harassment as a management technique" raises a matter of public concern, as necessary to prove official misconduct under the whistleblower act. Ferrel v. Colorado Dept. of Corrections, 179 P.3d 178, 187-188 (Colo.App., 2007). That court also found that an employee's complaints about changes to a chain of command did not implicate the public interest. Ferril, id.

Here, Appellant claims the protection of the whistleblower act based on his complaints about his assignments and investigative leave, as well as Ms. Thomas' critical demeanor toward her subordinates. Those complaints did not allege official misconduct as defined in the whistleblower ordinance. Thus, Appellant's CSA interview, statements to Westword and Notice of Intent to Sue did not establish that necessary element of this claim.
Order

Based on the foregoing findings of fact and conclusions of law, it is ordered as follows:

1) The Agency dismissal dated August 31, 2011 is AFFIRMED;
2) Appellant’s retaliation claims are DISMISSED; and
3) Appellant’s whistleblower claims are DISMISSED.

DONE September 6, 2012.

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. The Career Service Rules are available as a link at www.denvergov.org/csa.

All petitions for review must be filed with the following:

Career Service Board
c/o CSA Personnel Director’s Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: Peter.Garritt@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.