DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

VINCENT MACIEYOVSKI, Appellant,

vs.

DEPARTMENT OF GENERAL SERVICES, FACILITIES MANAGEMENT,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on Jan. 13 and Feb. 12, 2014 before Hearing Officer Valerie McNaughton. Appellant was present and represented himself. Assistant City Attorney John Sauer represented the Agency in these proceedings, and James Williamson served as the Agency's advisory witness. Appellant, Gary Martinez, Suzi Latona, and James Williamson testified for the Agency, and Appellant testified on his own behalf.

I. STATEMENT OF THE APPEAL

Appellant Vincent Macieyovski appeals his eight-day suspension imposed on Oct. 28, 2013 by the Denver Department of General Services, Facilities Management (Agency). Appellant also raises claims of national origin discrimination, retaliation and violation of the whistleblower ordinance. The parties stipulated to Agency Exhibits 1 - 17, and to Appellant's Exhibits A, C, D, K, M, P-6, T and U. Appellant's Exhs. H and N were admitted during the hearing.

II. ISSUES FOR HEARING

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 an eight-day suspension was within the range of penalties that could be imposed by a reasonable administrator for the violations established by the evidence?

3) Did Appellant prove by a preponderance of the evidence that the Agency discriminated against him based on his national origin?

4) Did Appellant prove by a preponderance of the evidence that the Agency's action was retaliation for protected activity, and
5) Did Appellant prove by a preponderance of the evidence that the Agency's action violated the Whistleblower Protection Ordinance?

III. FINDINGS OF FACT

Appellant Vincent Macieyovski has been an HVAC Master Trades Worker with the Department of General Services since 2003. His duties include installation, repair and maintenance of HVAC equipment in city facilities. Appellant is required to hold current journey-level certifications in heating and ventilating, air conditioning and refrigeration, stationary engineering, and steam and hot water. (Exh. 7.)

On Oct. 28, 2013, the Agency suspended Appellant for eight days for failing to return his old city-issued uniforms, and for being out of uniform at a city function. The disciplinary letter also found that Appellant had failed to verify that his certifications were current. (Exh. 1.) The Agency withdrew the certification charges at the beginning of the hearing. Thus, only the asserted violations of the uniform policy are at issue in his challenge to the discipline.

Facilities Management first published its current administrative policies to its employees in 2003, and revised them in 2010. (Exh. 6.) "Employees will be expected to adhere to these administrative procedures" or face disciplinary action. (Exh. 6-1.) The uniform policy requires employees to "wear the official uniforms issued by Facilities Management" while on duty. (Exh. 6-6.)

In January 2011, Terrie Gathron, Executive Assistant to the Agency's Director, informed team leaders that they must turn in their old uniforms when they pick up their new uniforms. That policy was repeated in an Aug. 17, 2013 email to Appellant's supervisor, Gary Martinez. (Exh. 17.) Prior to that time, employees had been permitted to keep or donate their old uniforms. The Agency now replaces all uniforms every two years to ensure that uniforms for its 97 staff members are in good condition and properly identify General Services employees to the public. (Williamson, 2/12/14, 9:01 am.)

On Aug. 8, 2013, Gathron notified Appellant that his new uniforms were available for pick-up. On Aug. 13th, Appellant's supervisor Gary Martinez reminded Appellant to bring in all of his old uniforms when he picks up the new ones. (Exh. 13-2.) Appellant responded by email that his uniforms were a work-related benefit, and so he would not return them unless there was a "clearly defined process based on CSA rules or DRMC." Gathron and Martinez replied that the City owned the uniforms, and that he must return them by noon on Aug. 16th or face discipline. (Exh. 11.) On Aug. 16, Martinez informed Appellant that discipline against him was being considered based on his failure to pick up his new uniforms and return the old ones, in addition to being out of uniform on Aug. 7th. (Exh. 10.)

By Sept. 20, 2013, Appellant and some other employees still had not returned their old uniforms. Facilities Management Director James Williamson emailed his management team and directed them to deliver all old uniforms to Gathron by Sept. 27th. (Exh. 9.) Appellant was served with a pre-disciplinary letter on Oct. 7th. (Exh. 3.) Appellant did not attend the pre-disciplinary meeting, but submitted a written response. Therein, he repeated that he considered the old uniforms his personal property earned during his employment, and added that ordering new uniforms may be inconsistent with the Fiscal Accountability Rules. Appellant also informed Williamson that he believed his 2012 transfer from the Denver Art Museum (DAM) to the Public Administration Building (PAB) was a misuse of his expertise in controls and energy efficiency. He reminded Williamson that in 2006 he had advised him of his concerns that the chilled water
return set point was wasting city resources, but that Williamson had dismissed those concerns. In his pre-disciplinary response, Appellant offered to assist in implementing the minimum operating parameters required on HVAC installations by the Building Code's Energy Conservation Code. (Exh. 2.)

At hearing, Appellant admitted that his old uniforms were city property, and that he had not returned all of them until December, 2013, despite the August order to do so. The Agency agrees that the uniforms designated as Exhibit A and brought to hearing for inspection are all of the old uniforms issued to Appellant, and that they have now been returned to the Agency. Appellant testified that he did not comply for two reasons: there was no policy requiring him to return the uniforms, and they have no residual value for the taxpayer, having been fully depreciated. He conceded that the city may have other reasons for collecting the old uniforms, including the fact that the Denver logo above the pocket identifies him as a city employee. (Appellant, 1/13/14, 9:18 am.) Appellant also admitted that he was wearing non-uniform shorts at the employee appreciation picnic on Aug. 7, 2013.

In support of his whistleblower claim, Appellant testified that he was hired in 2003 to ensure efficient operation of equipment in city buildings. His interests lie in the fields of energy efficiency and controls, and he believes those are the areas in which he is most useful to the city. Since 2006, Appellant has advocated for automated control systems to minimize energy use in city buildings. Some of his suggestions have been implemented, but Appellant believes he has not been properly recognized for his contributions. In late 2011 and early 2012, the Agency received a number of independent energy audits with numerous recommendations. Thereafter, Appellant spoke with Williamson in support of some of those recommendations, and again urged changes to the chilled water return set point to minimize energy losses. (Exh. U.) Williamson rejected changing the water set point because he believed it would violate the city's contract with Xcel Energy Company. Williamson considered all of the audit recommendations, and implemented those that would yield immediate benefits at a moderate price. He determined that higher-cost capital expenses to buildings like the PAB would yield a poor return on investment, since a planned bond election would render those improvements temporary and thus unnecessary. Williamson also decided that other recommendations would have to be deferred for budgetary reasons.

In Aug. 2012, Appellant was transferred involuntarily from the Denver Art Museum to the Public Administration Building to perform preventive maintenance work. In May 2013, Appellant was given a five-day suspension and placed on a performance improvement plan (PIP). (Exhs. 4, 5.) He believes that the transfer, discipline and PIP were imposed to retaliate against him for reporting his concerns about the Agency's failure to implement the energy audit recommendations. (Appellant, 2/12/14, 11:52 am.) His response to the pre-disciplinary letter also states that his transfer was inefficient, since he is the only one with the skills needed to save energy. During 2013, after his transfer, Appellant saved $500 a day in energy use at the PAB. (Exh. 2.)

Director Williamson made the disciplinary decision based on his findings that Appellant's five-month delay in complying with the order to return his old uniforms constituted a failure to obey a lawful order, and that Appellant also neglected his duty to wear the proper uniform at a city event. In 2011, Williamson set the policy requiring return of old uniforms because he believed universal use of the current uniform enhances security, discipline, and the ability of the public to accurately identify authorized city employees. He acknowledged at hearing that Appellant's uniforms show very little wear and few stains, but stated that he must consider average rather than individual usage in determining when and how to replace uniforms. Since
the same material, colors and styles are often unavailable from manufacturers a few years later.
Williamson has opted to replace the entire supply of uniforms rather than replace uniforms in a
piecemeal fashion. He noted in support of this decision that inspecting all uniforms for wear and
tear would be an ineffective use of taxpayer money, since it would take about 90 days and
require the hiring of an additional employee. (Williamson, 2/12/14, 10:27 am.)

In rendering the disciplinary decision, Williamson considered the length of time it took
Appellant to comply with several orders from his supervisors, and the fact that Appellant wore
non-uniform shorts to a city event. Williamson also considered Appellant's recent five-day
suspension for a similar incident in which he failed to obey an order. (Exh. 4-4.) It is Williamson's
practice to impose a more severe discipline where there has been recent discipline for the
same type of conduct. Despite the later removal of the certification issue from the discipline,
Williamson believes that an eight-day suspension is the appropriate level of discipline for
Appellant's violations of the uniform policy. (Williamson, 1/13/14, 3:16 pm.)

IV. ANALYSIS

The Agency bears the burden to establish the asserted violations of the Career Service
Rules by a preponderance of the evidence, and that an eight-day suspension was within the
range of discipline that can be imposed under the circumstances. In re Roberts, 40-10.9
(11/15/2010); see also Department of Institutions v. Kinchen, 886 P.2d 700, 707 (1994), citing
Colo. Const. art. XII, §13(8). Likewise, Appellant must establish his discrimination, retaliation
and whistleblower claims by a preponderance of the evidence. In re Morgan, CSA 63-08, 9
(4/6/09).

A. VIOLATION OF DISCIPLINARY RULES

1. Neglect of Duty under CSR § 16-60 A.

In order to prove a violation of this rule, an agency must prove the employee failed to
perform a job duty he knew he was obligated to perform. In re Serna, CSB 39-12, 3-4
(2/28/14), citing In re Campos, CSB 56-08 (6/18/00).

The Agency claims that Appellant neglected his duty to wear his current uniform while
on the clock on Aug. 7, 2013. Appellant admitted he was wearing non-uniform shorts on that
day at the employee appreciation picnic. Appellant's time clock entry demonstrates that he
was on duty at 11:41 am. when he was shown on camera wearing shorts with his uniform shirt.
(Exhs. 16, T.) I find that the Agency proved Appellant neglected a known job duty to wear his
uniform while on duty that day.

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

A violation of this rule requires proof that a supervisor communicated a reasonable
order, and an employee violated that order under circumstances demonstrating willfulness.
In re Mounjim, CSB 87-07 1/8/09). The nature of the conduct in question can support a
finding of willfulness. In re Dineen, CSB 56-11. 3 (12/20/12).

Facilities Management Director Williamson found that Appellant's month's-long delay in
returning his old uniforms was a violation of this rule. Appellant responded by claiming that he
owned the uniforms, and would not return them unless shown a rule or ordinance that required
their return. (Exhs. 2, 11.) This is direct evidence that Appellant's delay in obeying the order was
knowing and willful. It was Appellant's position at hearing that orders by a manager are not lawful unless specifically authorized in a rule or law. On the contrary, the City Charter empowers a manager to administer an agency by issuing orders necessary and prudent to accomplish the agency mission. That task would be impossible if the manager's powers were limited to those specifically set forth in rules, which must be of general applicability. See Denver City Charter, § 2.9.3. The responsibilities imposed by Charter to administer an agency necessarily bestow the powers required to execute those responsibilities. Here, the Agency established that the Director was empowered to issue orders to execute its uniform policy, and that Appellant willfully violated a direct order to return his uniforms, in violation of this rule.

B. DEGREE OF PENALTY

Appellant also contends that an eight-day suspension was too harsh for the misconduct at issue. The Agency counters that Appellant has three previous disciplinary actions, including a five-day suspension that same year for, among other violations, failure to obey a supervisor's order. (Exh. 4-1, 1-7.) The Director followed the city's progressive discipline policy by increasing discipline for similar conduct in order to provide deterrence to future misconduct, in accordance with CSR § 16-20. Appellant did not deny the underlying conduct proven in support of the discipline, but argues instead that the suspension was imposed for improper purposes, including discrimination, retaliation and whistleblowing. As stated below, I do not find that Appellant proved the Agency was motivated by any of those reasons in imposing this discipline. Under the circumstances presented, including Appellant's intentional rejection of the Director's authority to enforce the Agency's policies for at least three months, I find a reasonable administrator could easily conclude that an eight-day suspension was necessary to achieve the purposes of discipline based on the proven violations.

C. DISCRIMINATION CLAIM

Appellant proved that he is a member of a class protected from discrimination based on his national origin, Polish, and that he was subjected to discipline in October, 2013. Appellant failed to present any evidence that the discipline was imposed because of his Polish origin. The only evidence he offered was that his 2012 transfer may have been ordered in order to prevent the transfer of another employee of Russian heritage. The evidence did not show that Williamson had any motive to discriminate against Appellant on that basis. In addition, a transfer is not an adverse action, and this appeal is untimely as to the 2012 transfer. Appellant raised no evidence that the eight-day suspension was motivated by his national origin.

Appellant also testified that he believes his manager Suzi Latona favors U.S.-born employees in that she has granted vacation leave to others such as Greg Boyce, and denied him leave under the same circumstances in the spring of 2013. Appellant did not present any evidence of the national origin of Mr. Boyce, or of any other employee given more favorable treatment. There was no evidence linking the denial of leave to Appellant's national origin. Finally, Appellant did not appeal this action within 15 days of the alleged discriminatory act.

D. RETALIATION CLAIM

Appellant testified that he believes the Agency retaliated against him for this appeal by ordering him to produce his current certifications. However, that order was issued well before the appeal was filed. The Nov. 12, 2013 appeal challenges the October disciplinary action, and therefore the disciplinary action could not have been motivated by Appellant's filing of this
appeal a month later. There was no evidence presented of other adverse or retaliatory actions that could support a finding for Appellant on this claim.

E. WHISTLEBLOWER CLAIM

Violation of the city's whistleblower ordinance requires proof that a supervisor imposed or threatened an adverse action on account of an employee's disclosure of official misconduct. Official misconduct is an act or omission that is: 1) a violation of law, rule, executive order or ethical standards; 2) a waste of city resources; or 3) an abuse of official authority. In re Wehmhoefer, CSA 02-08, 4-5 (2/14/08); D.R.M.C. § 2-107(d).

Appellant first brought his concerns about energy conservation to the Director in 2006. (Exh. 2-2.) In August 2012, Appellant was transferred from the DAM to the PAB to do preventive maintenance. A year later, Appellant was suspended for five days and placed on a PIP. (Exhs. 4, 5.) This eight-day suspension occurred in late October, 2013, and was the only action appealed. Appellant did not present evidence that the prior actions constituted a pattern of retaliation stemming from his original 2006 complaints about energy waste.

Appellant testified that the HVAC equipment in the older city buildings is outdated, and replacement parts are unavailable. Ill-fitted windows and cracks compound the difficulties in achieving meaningful energy savings in these facilities. Appellant has invested a great deal of time in educating himself about energy conservation, and seeks to give the city the benefit of his knowledge and interest in this field. He believes that the Agency has targeted him for his advocacy in this area.

In support of his whistleblower claim, Appellant alleges that the Agency's decision to delay certain energy efficiency projects was official misconduct. He first argues that the decision violated FAR Rule 7.1. That rule provides general standards under which agency heads shall measure the fiscal prudence of proposed expenditures. In sum, spending must be necessary, reasonable, beneficial, budgeted, and in the best interest of the city. (Exh. B.)

Director Williamson testified about how his decisions were made with regard to the audit recommendations. He noted first that the average cost of its recommendations was $500,000. Williamson factored in cost, useful life, and ease of implementation in determining which recommendations to fund. Since the budget for management of the city's 106 is only two to three million dollars, he acted first on the "low-hanging fruit": those easiest to put into place at a modest cost. In contrast, Appellant's suggestions bore high cost for retrofitting a 32-year old building. Williamson determined that it was more fiscally prudent to submit the more expensive audit recommendations for inclusion in the next municipal bond election. (Williamson, 2/12/14, 9:31 am.) Appellant presented no rebuttal evidence showing that this decision was unreasonable.

Appellant next argues that the Agency's failure to implement certain of the energy audit recommendations was a violation of two executive orders. Those orders direct General Services to improve energy conservation, and follow federal EPA standards and best management practices in providing utility services to city facilities. (Exhs. B, D.) Appellant does not maintain that Williamson's audit decisions violated any specific provision of these orders. Instead, he claims that credit for his Green Print ideas was given to his supervisor instead of him. (Appellant, 2/12/14, 11:27 am; Exh. 2.)

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*Green Print is Denver's program to promote environmental practices within city operations.*
In Williamson's view, his responsibility under the City Charter to maintain city buildings supersedes the city's sustainability policy. Executive Order 123 states in part:

(A)ll buildings constructed, renovated or maintained with City funds . . . are to be designed, constructed, operated, and maintained according to the principles in the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) program, the United States Environmental Protection Agency's ENERGY STAR program, and other applicable best management practices for sustainability and energy efficiency.

Williamson recalled that Appellant's concerns included only items that were already the subject of the 2012 energy audits. Since the Agency was well aware of the energy audit recommendations, Appellant was not the source of the information alleged to be official misconduct. Therefore, Appellant's complaints were not disclosures within the meaning of the whistleblower ordinance. See Ward v. Industrial Commission, 699 P.2d 960 (Colo. 1985).

The Agency made reasoned decisions on the audit recommendations based on a variety of factors, including fiscal constraints, ease of implementation and the availability of future bond funding. The evidence does not support a finding that these decisions constituted official misconduct, or that Appellant's advocacy of conservation was a disclosure under the whistleblower ordinance.

Order

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

1. The Agency's disciplinary action imposed on October 28, 2013 is AFFIRMED.

2. Appellant's discrimination, retaliation and whistleblower claims are DISMISSED as unproven at hearing.

Dated this April 1, 2014

Valerie McNaughton
Career Service Hearing Officer