

**DECISION AND ORDER**

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IN THE MATTER OF THE APPEAL OF:

**LORI MACK**, Appellant,

vs.

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

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The hearing in this appeal was held on Jan. 30 and 31, 2013 before Hearing Officer Valerie McNaughton. Appellant was present and represented by Christi A. Sanders, Esq. Assistant City Attorney Jennifer L. Jacobson represented the Agency in these proceedings. The Agency presented the testimony of Agency Executive Director Paul Washington and Acting Director of Workforce Development Ledy Garcia-Eckstein. Appellant testified on her own behalf, and called Program Administrator Todd Nielson and Rico Figueroa as witnesses. 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

This is Appellant Lori Mack's challenge to a three-day suspension imposed on Oct. 23, 2012 by the Office of Economic Development (Agency or OED). Appellant also asserts retaliation and whistleblower claims. Agency Exhibits 1 to 8 were admitted by stipulation, and exhibits 9 and 11 were admitted during the hearing. Appellant's Exhibits A to L were also admitted. The Agency withdrew its Exhibit 10 on the second day of hearing.

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 a three-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 establish that the suspension was motivated by her whistleblower activities; and

4) Did Appellant establish that the suspension was imposed in retaliation for her protected activity?

### III. FINDINGS OF FACT

Appellant Lori Mack has been a city employee for 24 years, and currently serves as the Director of the Youth Services Program within the Workforce Development Division of the Office of Economic Development. As an Administrator II, Appellant "manages and supervises the overall operations and administration of the citywide youth employment program", and "[a]dministers and monitors contracts for compliance and expenditures." [Exh. 1-7.]

#### 1. Background and incidents giving rise to disciplinary allegations

On June 21, 2012, Youth Services employee Crystal Swan was at the site of a scheduled financial literacy class for youth enrolled in the Summer Youth Employment Program. The class was to be facilitated by Men Who Care, a company run by Appellant's husband, T.H. Mack. Mr. Mack did not arrive on time, and Ms. Swan released class participants at about 9:30 am. Later that morning, Appellant "explained to [Ms. Swan] that you still had to pay the instructor". Five days later, Appellant informed Human Resource personnel that she was not interested in extending Ms. Swan's contract because of continued attendance issues. Ms. Swan's limited term employment began on Apr. 10 and was set to end on July 31, 2012.

As a result of the events of June 21st, Ms. Swan contacted the Executive Director of the Career Service Authority (CSA) on June 28, 2012 to express her concern that Appellant may have a conflict of interest and may have inappropriately influenced the training vendor, Center for Relationship Education (CRE), to select the company owned by Appellant's husband to teach financial literacy. [Exh. 7.] Upon learning of this complaint, Agency Executive Director Paul Washington requested two separate inquiries: an investigation by CSA Employee Relations, and a programming and fiscal audit of the Youth Services Program. [Exh. 6.] The complaint was also referred to the Board of Ethics for consideration of Ms. Swan's conflict of interest allegation under the Denver Code of Ethics. [Exh. E.]

The Employee Relations investigation was conducted by Senior Human Resource Professional Ranae Taylor, who interviewed Appellant, Ms. Swan, Agency Executive Director Paul Washington, and Appellant's supervisor Ledy Garcia-Eckstein. The investigation concluded on Aug. 24, 2012 with findings that three of Ms. Swan's allegations against Appellant were substantiated. The sustained claims were that Appellant had failed to fully disclose her relationship with her husband's company, failed to maintain satisfactory work relationships, and engaged in conduct prejudicial to the city and OED by recommending Men Who Care to provide services for a program overseen by her. The report supported those conclusions by findings that Appellant "clearly demonstrated poor judgment and carelessness in her duties [by using] her official capacity to influence decisions that directly impacted her program." [Exh. 6-10.] The report found that the claim of intimidating conduct was not substantiated. [Exh. H.]

Three days after issuance of the CSA investigative report, the Agency served Appellant with a pre-disciplinary letter. [Exh. 2.] The letter alleged that the CSA investigation confirmed that Appellant failed to fully disclose to the Ethics Board her role in the oversight of the Summer Youth Program. It stated that Appellant had asked her administrative assistant to collect information about Ms. Swan, and later apologized that the assistant "took on a 'cop' approach

to dealing with them." The letter also asserted that Appellant shared confidential personnel information about Ms. Swan and other limited term employees with her staff. Finally, the letter alleged that the programming and fiscal review revealed that Appellant failed to fully disclose the relationship between Appellant and her husband's company to OED leadership, and used her position to influence CRE to select her husband's company as the financial literacy trainer for the summer program. [Exh. 2.] The programming and fiscal review report was not offered or admitted into evidence in this appeal. Appellant was given a summary of the report prior to the pre-disciplinary meeting, but the Agency did not disclose the full report to Appellant out of concern that it would cause Appellant's subordinates to feel that the information they provided could be used against them. [Exh. G-29.]

On Sept. 13, 2012, Channel 7 News published an article under the headline, "Denver ethics board members under subject of 2 investigations – Lori Mack has worked for the city 20 years." The article quoted Derek Woodbury of the OED who confirmed that the matter was "still an open investigation, an open personnel process." The next day, the article was attached to an email sent by the Director of Communications to all Career Service Authority employees. The email informed them of the media coverage, with an explanation that the investigative report had not been released to the media on the advice of the City Attorney's Office because the matter was "still under review and a final judgment has not been made." [Exh. J.]

On Sept. 14, 2012, the Board of Ethics held its meeting to consider the ethics complaint presented by Ms. Swan. The board had requested that Assistant City Attorney Jennifer Welborn conduct their investigation in order to avoid any potential conflict of interest, since Appellant has been a member of the five-person Board of Ethics since 2008.<sup>1</sup>

The board issued its decision dismissing the complaint on Oct. 2, 2012. [Exh. E.] The decision included several findings about the nature and operations of both the Summer Youth Employment Program and the funding for companies providing training services to that program. It determined that the Summer Youth Program provides city youth with job training, mentorship and skill-building opportunities, and that Appellant oversees that program. The Agency directly pays for some of those services out of its budget, but also partners with other organizations with similar missions who provide the services out of grant proceeds or their own budgets. The financial literacy training was a part of one such partnership. In the situation presented, OED had signed a Memorandum of Understanding (MOU) with a non-profit company called Center for Relationship Education (CRE). The MOU stated that CRE would provide relationship education to young people referred by the Youth Services Program at no cost to the city.

A previous Board of Ethics advisory opinion issued on Feb. 22, 2012 had already found that CRE's funding for the financial literacy training came through the Colorado Healthy Relationship Organization and the U.S. Department of Interior. It further found that Appellant had taken and could take no direct official action regarding the proposed financial literacy trainer, which was the company Men Who Care owned by Appellant's husband, because there was no contract between the OED and Men Who Care. The February opinion concluded there was no conflict of interest presented by the fact that a company run by Appellant's husband would provide training to youth served by Appellant's agency. [Exh. D.]

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<sup>1</sup> Appellant did not participate as a member of the Board of Ethics in either the February request for advisory opinion filed by T.H. Mack or the investigation into the complaint of Crystal Swan. [Exhs. D-1; E-1.]

In its Oct. 2, 2012 decision on the complaint of Crystal Swan, the Board of Ethics concluded that Appellant did not and could not take any direct official action to ensure payment of her husband for the June 21<sup>st</sup> training session, and that Appellant did not attempt to influence anyone to make such a payment. It dismissed the complaint because it found that the alleged statement by Appellant that the trainer might have to be paid regardless of his absence did not establish a violation of the Code of Ethics. It relied in part on its previous finding that the city was not a party to a contract to pay either training provider for their services. [Exh. E.]

A few days prior to issuance of the Board of Ethics opinion, the pre-disciplinary meeting in this matter was held. At that time, Appellant communicated through her attorney that she had informed her supervisor at a weekly meeting that CRE was considering employing her husband's company to teach classes for youth served under the MOU. Appellant further stated that she gave her supervisor a copy of the advisory opinion of the Board of Ethics which found no conflict of interest presented by the teaching contract. Appellant added that Ms. Garcia-Eckstein "never raised any issue or objection" to the ethics opinion. [Exh. G-24.] Mr. Washington stated that he did not suggest Appellant was unethical or that her program was ineffective. He stated that the investigations related to the appearance of impropriety created because of her "judgment to bring your husband so close to a program that you control". [Exh. G-32 – 33.]

## 2. Disciplinary letter

On Oct. 23, 2012, Appellant was notified that she was suspended for three days for violation of six disciplinary rules. The letter eliminated the allegation that Appellant had divulged confidential information under § 16-60 X, which had been based on the late June staff meetings regarding Ms. Swan. [Exhs. 1-3, 2-3.] The letter contained the same factual allegations as the pre-disciplinary letter, except for removal of the charge that Appellant had failed to fully disclose her oversight role to the Ethics Board. The letter included a description of the June 21<sup>st</sup> interaction between Appellant and Ms. Swan, but stated that it was not a basis for the suspension based on the Board of Ethics opinion that it did not constitute an ethical violation. [Exhs. 1, E.]

The disciplinary letter found that Appellant suggested to CRE that it should use her husband's company as a potential vendor of financial literacy training under the city program. It also found that Appellant "exercised very poor judgment by allowing your husband's company to provide services as a subcontractor to a program that you administer", and that Appellant failed to inform Mr. Washington or Ms. Garcia-Eckstein that CRE would be using MWC as a vendor. "[T]his "contractual arrangement gives rise to at least the appearance of an unethical alliance" that has or will raise serious concerns by the public and those partnering with the Summer Youth Program, which in turn adversely affects the integrity of the program. Further, it found that Appellant failed to apprise her supervisor or Mr. Washington "that CRE would be using your husband's company as a vendor." [Exh. 1-4.] Appellant filed a timely appeal of this action.

## 3. Testimony at hearing

Mr. Washington testified that he reviewed the investigatory report and considered its findings in making the final decision in this matter. He also asked Ms. Garcia-Eckstein to contact

Rico Figueroa of the Center for Relationship Education for details about Appellant's involvement in the selection of Men Who Care as its financial literacy provider. Ms. Garcia-Eckstein reported back that CRE told her that Appellant and her staff solicited CRE to use Men Who Care. [Washington, 1/30/13, 9:02 am.] Mr. Washington took that information into consideration, along with Appellant's employment and disciplinary history.

Mr. Washington found that Appellant neglected her duty to exercise good judgment by having her husband involved in the program that she administers. For the same reason, he found that Appellant was careless in the performance of her duties and failed to meet her standards of performance. He determined that Appellant had failed to maintain satisfactory work relationships because she put Ms. Swan and other Youth Services staff in the awkward position of having to handle an issue with her supervisor's husband. [Washington, 1/30/13, 9:05 – 9:07 am.]

As to the ethics allegation, Mr. Washington testified that he reached a different conclusion than the Board of Ethics because he believed it did not have full information about the nature of the relationship between Appellant and her husband's company. He found that Appellant's oversight of the program and tacit approval of her husband's teaching contract with the city's provider violated Code of Ethics § 2-61. Finally, Mr. Washington found that her conduct was prejudicial to the Agency because the appearance of impropriety created by her actions would jeopardize future fundraising if potential donors were to learn of the matter. [Washington, 1/30/13, 9:07 – 9:11 am.]

Mr. Washington decided to impose a three-day suspension based on these violations because he was concerned that Appellant as a high-level official expressed no sense of accountability for her poor judgment, resulting ultimately in the time spent in this appeal, when there were other less distracting alternatives that could have been pursued. [Washington, 1/30/13, 9:11.]

Rico Figueroa of the Center for Relationship Education (CRE) testified that his company is a non-profit that provides educational services on marriage and healthy relationships, and that it collaborates regularly with similar training organizations. Mr. Figueroa met Appellant in 2010, and they discussed CRE's marriage relationship grant. Appellant invited Mr. Figueroa to meet her husband T.H. Mack because his company did fatherhood training. During the course of their meeting, Mr. Figueroa learned that Mr. Mack also did financial literacy training, as well as mentoring and fatherhood work. CRE and MWC first partnered to present at non-city workshops in the spring of 2011, then worked together to do training for the city's Summer Youth Program.

Mr. Figueroa confirmed that Appellant recommended MWC to do the financial training, and that it would not have been selected without that recommendation. [Exh. 11.] He stated that in addition to the recommendation, MWC went through CRE's own internal selection process. At the time he received Appellant's Nov. 2011 email, Mr. Figueroa was already aware that MWC taught financial literacy, as CRE and MWC had worked together in various projects, including OED's 2011 Summer Youth Employment program. [Figueroa, 1/30/13, 9:04 – 9:07am.]

In the summer and fall of 2011, CRE was applying for a Department of Interior relationship education grant, and met with OED Program Administrator Todd Nielson to discuss partnering with the city on that grant. When financial literacy was added to the grant criteria, CRE suggested MWC as the provider for that element of the grant. In the fall of 2011, Mr. Nielson

brought Mr. Figueroa to Appellant's office to present the idea of using MWC. Because Appellant and Mr. Mack were married, Appellant told CRE to stop the selection process until use of MWC could be presented to the city's Board of Ethics for a determination of whether it was a conflict of interest. Mr. Figueroa then began looking for other financial literacy providers, but was unsuccessful. In February or March 2012, Appellant informed Mr. Figueroa that the Board of Ethics had cleared Mr. Mack and MWC as providers for CRE. The contract between CRE and MWC was then executed, and the training under the grant began in the spring of 2012. [Figueroa, 1/31/13, 9:01 – 9:15 am.]

Program Administrator Todd Nielson testified that his job is to ensure that training used in any Youth Services program is appropriate to Youth Services criteria and the population it serves. Initially, he reviews potential training providers to determine that their program aligns with the goals of the Youth Division. Mr. Nielson worked closely with CRE during the MOU process and in its selection as trainer for both the 2011 and 2012 Summer Youth Programs. Once a program is approved under OED guidelines, Mr. Nielson directly coordinates the work of all assigned trainers on behalf of the Agency. [Nielson, 1/30/13, 11:28, 11:42 am.]

Mr. Nielson stated that the partnership with CRE was attractive to Youth Services because it allowed them to train 64 youths it could not otherwise serve, without cost to the city. CRE as provider of the funds could use any trainer it preferred, as long as its curriculum met OED program standards. Mr. Nielson approved MWC's program, and also recommended three other potential providers to CRE: Operation Hope, the Young Americans Center for Financial Education, and the Denver Employees' Credit Union. After confirming that the training to be provided by MWC met his program criteria, Mr. Nielson took no action in CRE's selection process. [Nielson, 1/30/13, 11:36, 11:58 am.]

Mr. Nielson stated that in June 2011, Mr. Figueroa told him he had met T.H. Mack at fatherhood initiative training, and suggested using MWC for the financial literacy training. They went to Appellant's office to discuss the matter. Appellant immediately told them to stop the process and allow the Board of Ethics to determine if it presented a conflict of interest. [Nielson, 1/30/13, 11:36 – 11:39 am.] Appellant told her supervisor Ms. Garcia-Eckstein about CRE's proposed use of MWC during a staff meeting. Later, Appellant gave Mr. Nielson and two other staff members a copy of the ethics opinion clearing MWC as a provider. Mr. Nielson believes that Appellant also gave her supervisor a copy of the opinion, based on her usual practice of being very transparent in her interactions with her staff and supervisor. [Nielson, 1/30/13, 11:45, 11:49 am.] Appellant confirmed that she did give Ms. Garcia-Eckstein a copy of the decision. [Appellant, 1/30/13, 3:58 pm.] Ms. Garcia-Eckstein testified that she did not recall receiving the ethics opinion. [Garcia-Eckstein, 1/30/13, 3:25 pm.]

Appellant testified that she met Mr. Figueroa in a social context in 2010, and they discussed the work CRE was doing in healthy relationship training. Appellant also contacted CRE after seeing its brochures on healthy relationships with the intent to obtain copies for OED's spinning magazine rack in the office. [Appellant, 1/30/13, 3:45 pm.] Appellant offered to put Mr. Figueroa in touch with her husband T.H. Mack because he was involved in fatherhood training, and Appellant viewed her job as facilitating connections among the nonprofit community. CRE and MWC thereafter did some joint training in non-city projects. [Appellant, 1/30/13, 1:48 , 2:15 pm.] When Mr. Nielson brought Mr. Figueroa into her office to discuss the use of MWC for the financial literacy training in Sept. 2011, Appellant stopped the process and referred them to the Board of Ethics for a determination under the conflict of interest rules

"because I thought it would be problematic". [Appellant, 1/30/13, 1:36 pm.] Appellant informed her supervisor that CRE was considering her husband's company to do some of the training under the city MOU, then later gave her a copy of the ethics opinion which determined that use of MWC did not violate the ethics code. [Appellant, 1/30/13, 2:15 pm.]

Appellant was concerned about the appearance of using her husbands' company as a part of the MOU, and would have preferred to pay another vendor out of city funds. Appellant met with Mr. Washington on Jan. 27, 2012 to explain that there were critical needs associated with the Summer Youth Program. Appellant then solicited three other proposals from training companies to obtain cost estimates, including the Credit Counseling Service and the Denver Community Federal Credit Union. However, the only funding source available to Youth Services was the federal Community Services Block Grant due in March 2012. That funding was not received until July 2012, well after the summer program began. Therefore, MWC did the training by default, since Youth Services had no funds to contract for alternate training. [Appellant, 1/30/13, 3:55 am.]

#### 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 the discipline 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). Appellant bears the burden to establish her retaliation and whistleblower claims by a preponderance of the evidence. In re Lombard-Hunt, CSA 75-07, 7 (3/3/08).

#### **A. VIOLATION OF DISCIPLINARY RULES**

##### 1. Neglect of duty under CSR § 16-60 A.

An employee neglects a duty in violation of this rule when she fails to execute an important work duty known to her, and that failure results in significant potential or actual harm. In re Lottie, CSA 132-08, 2 (3/9/09). An agency must communicate the importance of the work duty to the employee in such a manner that a reasonably astute employee would be aware of it. In re Compos, CSA 56-08, 14 (12/15/08).

The Agency cites to Appellant's annual performance review in support of this charge, asserting that Appellant was required to exercise good judgment in her duty to administer and monitor "contracts for compliance and expenditure." [Washington, 1/30/13, 10:29 am; Exh. 1-7.] The Agency contends that Appellant created the appearance of impropriety and placed her employees in an awkward position by her tacit approval of a contract between her husband's company and a company providing training for Youth Services clients. In the Agency's view, Appellant neglected her duty to run her program by failing to demonstrate a sense of accountability for her actions. [Washington, 1/30/13, 9:05 am.] The issue then is whether Appellant's recommendation of her husband's company constituted neglect of a duty known to Appellant, either by failure to administer a contract or by failing to accept responsibility for her actions.

The first duty cited by the Agency is her obligation to administer city contracts involving her program. [Exh. 1-7.] The undisputed evidence presented on this allegation is that the

relationship between the Agency and Men Who Care was not contractual, and involved no expenditure of city or Agency funds. The partnership between the Agency and CRE was defined by a Memorandum of Understanding that CRE would provide relationship training to youth referred by Appellant's program. The training was funded not by the city but by a grant bestowed by the Department of Interior to a private company, CRE. Mr. Nielson of Youth Services reviewed CRE's program and determined that it met the Agency's criteria, which in turn permitted the Agency to refer its clients to participate in the training. CRE then selected its own subcontractors based on its own internal process, including a recommendation from the Agency. The absence of a contract between the city and either CRE or Men Who Care compels a conclusion that the Agency failed to prove Appellant neglected her duties with regard to Appellant's specific duty to administer city contracts involving her program.

As to the Agency's second argument, the Agency does not identify a duty other than her overall responsibility to run the Youth Service Program. If that were sufficient to prove a violation of this rule, a supervisor's legitimate exercise of business judgment could lead to discipline. This rule requires that an agency communicate an important work duty to an employee in order to give employees reasonable notice of conduct that may violate the rule. See In re Compos, CSA 56-08, 14 (12/15/08).

Moreover, the only evidence produced on the allegation that Appellant failed to take responsibility arose from the pre-disciplinary meeting. [Exh. 1-4.] The Career Service Rules permit any employee to contest disciplinary action by denying both the factual and rule-based allegations during the pre-disciplinary process. CSR § 16-40 B.1. Such denials in pursuit of an employee's due process right to be accorded a pre-disciplinary opportunity to be heard cannot be used as evidence in support of an adverse action. In particular in this context, there is no job duty directly associated with an employee's pre-disciplinary statements. In summary, the Agency failed to establish a violation of this rule.

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

Carelessness under this rule is proven by evidence of performance of a duty without reasonable care, resulting in potential or actual significant harm. In re Roberts, CSA 40-10, (11/15/2010). Here, the Agency submits the same evidence in support of this violation as that offered on the neglect allegation. [Washington, 1/30/13, 10:33 am.] Since there was no city contract being administered, Appellant cannot be found to have performed that duty carelessly. As found above, Appellant's statements during the pre-disciplinary meeting cannot be used to prove carelessness in the performance of her duties.

## 3. Failure to meet established standards of performance under CSR § 16-60 K.

This rule requires proof that the Agency set a standard of performance for Appellant, clearly communicated that standard, and Appellant nonetheless failed to meet that standard. In re Rodriguez, CSA 12-10, 9 (10/22/10); In re Mounjim, CSA 87-07, 8 (7/10/08), *aff'd* (1/8/09). Performance standards may be found in an agency or division performance evaluation, classification description, or in its policies and procedures. General statements of aspirational performance goals are not enforceable standards of performance. Id.

The Agency again relies upon Appellant's duty to administer contracts in support of this violation. [Washington, 1/30/13, 10:29 – 10:35 am.] As found above, Appellant's

recommendation of her husband's company to a service provider did not relate to her duty to administer city contracts, as the relationship of OED to Men Who Care was not contractual in nature. Therefore, the Agency did not establish that Appellant failed to meet a performance standard in violation of this rule.

#### 4. Conduct violating Code of Ethics under CSR § 16-60 Y

Appellant is next charged with violating the Code of Ethics, D.R.M.C. § 2-51 et. seq. based on her tacit approval of her husband's selection as trainer for a city service provider, and her ultimate oversight of her husband's training services as Director of Youth Services.

OED Youth Services learned in the fall of 2011 that its MOU partner for summer youth training desired to use Appellant's husband to teach financial literacy, and pay for his services with its own grant funds. Appellant halted the selection process and referred the parties to the Board of Ethics for an advisory opinion as to whether this presented a conflict of interest under the city's ethics code. On Feb. 7, 2012, T.H. Mack filed a request for an advisory opinion with the Board of Ethics. Based on the information provided, including Director Mike Henry's interview of Appellant, the Board concluded that there was no conflict of interest created. It based its conclusion on its finding that Appellant could take no direct official action in the matter, as there was no contract between the city and MWC. [Exh. D; Appellant, 1/30/13, 2:36 pm.]

The phrase "direct official action" in this context includes taking action on behalf of the city on a contract "in which the city is a party," or selecting or recommending vendors "to do business with the city." D.R.M.C. 2-52(b). Here, the city is not a party to the contract between CRE and MWC. Youth Services is an indirect beneficiary of the educational services provided by CRE and MWC in that its young clients receive training as a part of its summer program. The Board of Ethics found that such a relationship was not direct official action under the Code of Ethics. Since the purpose of the Board of Ethics is "to issue advisory opinions waivers on ethical issues arising under [the Code of Ethics]", its interpretation of the meaning of that ordinance is entitled to great weight. D.R.M.C. § 2-53(a).

Most significantly, the Code of Ethics states that "[a] person whose conduct is in accordance with an advisory opinion or a published advisory opinion of the board of ethics shall not be found in violation of any of the provisions of this article." D.R.M.C. § 2-54(d). An appointing authority's disagreement with an advisory opinion issued under this rule does not justify an exception to its mandatory language.

The disciplinary letter states that Appellant suggested her husband's company to CRE as a service provider, and supports that contention with an email from Appellant to CRE's Rico Figueroa dated Nov. 3, 2011, inviting Mr. Figueroa to contact Mr. Mack for the financial literacy training. [Exh. 11.] Appellant denies that this communication was anything more than an effort to bring together organizations that do similar non-profit work, in keeping with her role at OED to promote community partnerships. [Appellant, 1/30/13:48 pm.] She added that CRE had already identified MWC for the financial literacy training, and had approached Program Administrator Todd Nielson in the fall of 2011 to have his curriculum approved for consistency with Youth Services goals for its summer program. [Appellant, 1/30, 1:36 pm.] Both Mr. Figueroa and Mr. Nielson confirmed that account of events. In addition, the appointing authority informed Appellant during the pre-disciplinary meeting that he was not asserting that her conduct was unethical. [Exh. G-12, G-32.] In any event, Appellant's conduct was in accordance with the

advisory opinion, and therefore it cannot be found to have violated any of the provisions of the ethics code.

5. Conduct prejudicial to the Agency under CSR § 16-60 Z.

This rule requires proof that Appellant's conduct resulted in actual harm to the mission of the Agency or to the reputation of the city. In re Jones, CSB 88-09A (9/29/10). The Agency supported this allegation by Mr. Washington's testimony that Appellant's conduct could harm Youth Services fundraising if potential donors were to learn of it. [Washington, 1/30/13, 9:10 am.] There was no evidence that the Agency suffered actual harm to its mission as a result of Appellant's conduct, or that the city's reputation was harmed thereby. As a result, the Agency failed to establish a violation under this rule.

Since the Agency did not establish a violation of any disciplinary rule, the discipline must be reversed. The level of discipline imposed is therefore moot.

**B. RETALIATION CLAIM**

A claim of retaliation under the Career Service Rules requires Appellant to prove that she engaged in a protected activity, and that the Agency's discipline was imposed as a result of that activity. In re Rock, CSA 09-10, 6-7 (10/5/10), citing Burlington Northern & Santa Fe Ry. v. White, 126 S. Ct. 2405, 2415 (U.S. 2006).

Appellant testified that she reported financial mismanagement by the Agency, but concedes that this allegation is not included in the grievance she filed on Sept. 10, 2012 against her supervisor. Appellant presented no evidence that she engaged in any other protected activity. Therefore, Appellant failed to meet her burden to establish this claim.

**C. WHISTLEBLOWER CLAIM**

Under the facts presented in this appeal, a whistleblower claim would be raised by proof that the Agency imposed the suspension because of Appellant's report of official misconduct. "Official misconduct" means any act or omission by any officer or employee that constitutes 1) a violation of law, 2) a violation of any applicable rule, regulation or executive order, 3) a violation of the code of ethics or any other applicable ethical rules and standards, 4) the misuse, misallocation, mismanagement, or waste of any city funds or other city assets, or 5) an abuse of official authority. In re Wehmhoefer, CSA 02-08, 4-5 (2/14/08); D.R.M.C. § 2-106, 107 (d).

Appellant testified that she informed city council sometime in 2008, 2009 or 2010 that Youth Program funds were being blended into other work. [Appellant, 1/30/13, 2:52.] Appellant did not identify that this conduct violated a law, rule, ethics code or other standard, or that there was a misuse or waste of city funds as a result of this situation. Appellant presented no evidence that Mr. Washington, a new appointee in 2011, knew of her report or was motivated by a desire to retaliate against her for this action. The passage of time alone argues against a finding for Appellant on the whistleblower claim, and Mr. Washington's lack of personal involvement in the matter contributes to a conclusion that the suspension was not caused by her report to city council.

Order

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

1. The Agency's three-day suspension dated October 23, 2012 is REVERSED.
2. Appellant's retaliation and whistleblower claims are DISMISSED.

DONE March 18, 2013.

  
Valerie McNaughton  
Career Service Hearing Officer