HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. A076-17

DECISION AND ORDER MODIFYING PENALTY

ROBERT MANCUSO, Appellant,

v.

DENVER INTERNATIONAL AIRPORT,
and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

Appellant appeals his dismissal for alleged violations of specified Career Service Rules, and Agency rules, regulations and orders. A hearing concerning this appeal was conducted by Daniel C. Ferguson, Hearing Officer, on February 9, 2017. The Agency was represented by Jessica Allen, Assistant City Attorney, while the Appellant was represented by Sean Olson, Esq., of the Olson Law Firm, LLC. At the opening of the hearing, the parties stipulated to the admission of Agency Exhibits 1 through 6, and Appellant Counsel withdrew his offer of Exhibits A, B, C and F. The Agency objected to Exhibits D, E, G, H and I. During the hearing Agency exhibits 8, 9, 11 and 17 were admitted. Appellant's exhibit D was admitted without objection, and Exhibits E, G, H, I, K, L, M, and N were admitted over Agency objections. Dave LaPorte, Senior Vice President of Airport Operations, Jim Zimmerman, Communications Center Assistant Manager, Sean Dohoney, Airport Operations Representative, Kari Cramer, Airport Emergency Dispatcher, and Karla Pierce, Assistant Director, Employment and Labor Law Section, City Attorney's Office, were called and testified for the Agency. Robert Mancuso, Appellant, was called by Appellant Counsel and testified in his own behalf. Airport Operations Representative Megan Voisard, a former Communications Center employee who was allegedly threatened, declined to testify in this hearing.

II. ISSUES

The following issues were presented for appeal:

A. Whether the Appellant violated either Career Service Rule (CSR) 16-29 A, D, G, I, R or T;

B. If the Appellant violated any of the Career Service Rules, whether the Agency's decision to dismiss him from employment conformed to the purposes of discipline under CSR 16-41.

III. FINDINGS

Appellant was employed by the Department of Aviation, Airport Operations Division, in the Communications Center, Denver International Airport (DIA). His original date of hire was June 25, 2007. At the time of the incident which gave rise to this appeal, Appellant was the Supervisor of the night shift in the DIA Communications Center. On Monday, September 11, 2017, at about 1:00 a.m., Appellant was playing a card game with three other Center

employees, Sean Dohoney, Kari Cramer, and Megan Voisard. The Agency contends that during this card game Appellant became angry, either because he was not playing well or others were winning, and threatened to "punch" Megan Voisard in the face, and further, that Appellant threatened retaliation if his conduct were reported.

Appellant was served with a Contemplation of Discipline Letter, Ex. 2, on October 11, 2017. Thereafter, on October 14, 2017, Appellant sent an e-mail, Ex. 3, to the City Help Desk, asking a question about Executive Order 112, and how to interpret employee statements regarding violence. On October 17, 2017, Appellant called the office of the City Attorney, and spoke with City Attorney Karla Pierce, regarding the questions he had raised in his Ex. 3 e-mail.

Kari Cramer, an Airport Emergency Dispatcher in the DIA Communications Center, was called by the Agency. She testified that Appellant became angry during the card game on September 11, 2017, and made the statement to Airport Operations Representative Megan Voisard that he was going to punch her in the face. Cramer stated she then told Appellant, admittedly in a light-hearted manner, that he could not threaten violence, that it could be considered an assault. Cramer further testified that Appellant pushed back from the table, became aggressive, and said that if anyone wanted to report his comments that they would not be permitted to play games, and then demanded that they continue playing. The card game then continued further for some hours. Ms. Cramer testified that within a day or two she informed their supervisor, Jim Zimmerman, of the incident, and that she provided a written statement, admitted as Ex. 1, dated September 22, 2017. She stated that the reason she reported the incident was that she was afraid that Ms. Voisard would not do so. During cross-examination, Ms. Cramer agreed that there was banter during the card games, that many people made jokes, that Appellant Mancuso made his comment to Ms. Voisard in a joking light-hearted manner, and that she did not believe that Mancuso intended physical harm. She further agreed that they continued to play cards that night, and on subsequent nights during the following weeks.

Sean Dohoney, Airport Operations Representative, DIA, also testified regarding the incident during the card game, stating that Appellant Mancuso made a threatening comment to Ms. Voisard, that no one was laughing or smiling, and that Mancuso also said management would revoke the employees playing privileges if Appellant's comment was reported. He stated that Ms. Voisard looked surprised and shocked, and that she blushed. Dohoney admitted that he did not feel personally threatened by Appellant's comment, but that if Appellant were reinstated, that he did not know if he could work with him, that communication was important in their work, and that emotions in the workplace were not good.

Jim Zimmerman, Communications Center Supervisor, DIA, was called by the Agency. The Appellant worked as supervisor in the Communications Center under Mr. Zimmerman, who stated that he learned on September 12, 2017of the incident that had occurred during the card game on September 11th, from another employee, Kimball Tate, during a one-on-one meeting, who reported hearing about the incident from Kari Cramer. He stated that he then contacted Cramer on September 13th, and spoke with her, and after reporting what he had learned of the incident to his supervisor, Dave LaPorte, he was told to ask Cramer for a written statement, which she provided on September 22nd, (Ex. 1). After completing his investigation, Mr. Zimmerman reported his findings to Mr. LaPorte. Appellant was not placed on leave at this time, based on the recommendation of Human Resources (HR) that there was not an immediate threat of violence, and because the employees involved in the incident had gone on their regular days off.

Mr. Zimmerman identified Ex. 2, the Contemplation of Discipline Letter which he served on Appellant Mancuso on October 11, 2017. He stated that he provided information regarding the

incident, and that the letter was prepared in coordination with HR and the City Attorney's Office. Prior to serving Ex. 2 on Appellant, Mr. Zimmerman had not spoken to him about the incident, in order to give time for him to gather facts about the incident from the other employees involved. He stated that he first spoke to Appellant about the alleged threat on October 11, 207, when he called Mancuso into his office to serve Ex. 2 on him. He testified that he believed he asked Mancuso if he told Ms. Voisard that he was going to punch her in the face, and that Mancuso replied it didn't happen. He further testified that he then provided more information about the situation, and Mancuso then said it could have happened. Mr. Zimmerman then stopped Mr. Mancuso from saying anything further and served Ex. 2 on Mancuso. He stated that the Contemplation of Discipline letter provides for a meeting to be held to give Appellant an opportunity to correct any errors, to tell his side of the story, and to provide any mitigating information as to why any disciplinary action should not be taken. In Ex. 2 that meeting was scheduled to be held on October 18, 2017. Mr. Zimmerman also identified Ex. 4, a Contemplation of Discipline Letter dated October 18, 2017. He stated the reason for the second letter was to add additional allegations regarding Appellant's e-mail to the Agency's Help Desk and his telephone call to the City Attorney's office. He noted that the statement in the October 11th letter on page three in the middle paragraph, "…Although the comment was made in a joking manner …", was language which was mistakenly not included in the October 18th Contemplation letter.

Ex. 7, a Performance Enhancement Program Report, referred to as a PEPR, was identified as the 2017 performance goals for Appellant. The goal listed on the bottom of page 2 of the exhibit, continuing on page 3, refers to Interpersonal Skills and Professional Behavior, and relates to both Ex's. 2 and 4, which state that possible cause for discipline include violations of CSR 16-29 G 1, as they relate to interpersonal skills and professional behavior.

Ex. 8, a six-month Performance Improvement Plan (PIP), dated February 8, 2017, sets forth "Concerns and/or Areas that are in Need of Immediate Improvement". Mr. Zimmerman stated that Appellant completed this PIP successfully, while working mostly on the day shift to monitor Appellant's progress, after which Appellant returned to the night shift. The comments in Ex. 8 reflect the concerns of management regarding Appellant's interactions with his employee team. Ex. 9, dated February 17, 2014, was identified as a Memo of Instruction to Appellant regarding inappropriate comments and behavior of Appellant in the Communications Center. Mr. Zimmerman identified Ex. 11, dated 2/10/16, Supervisory Evaluation (PEPR) for the period 1/1/15 to 12/31/15, as his evaluation of Appellant, in which he rated Appellant as a 2, below expectations, for Outcome 4 Professionalism and Interpersonal Relationships. He based this rating on Appellant's condescending attitude toward employees in professional meetings, as noted in his comments in Ex. 11 on Outcome 4. Mr. Zimmerman also identified Ex. 9, a Memorandum of Instruction, dated February 17, 2014, given to Appellant Mancuso, concerning appropriate interactions with team members and other employees, which states in part. "**In the future you will insure your comments are appropriate for the workplace. Make sure you address all team members, as well as internal and external customers in a respectful manner."** (Emphasis in original document)

During his investigation of the September 11, 2017 incident, in addition to Ms. Cramer, Mr. Zimmerman spoke with Mr. Dohoney and Ms. Voisard. When he spoke to Ms. Voisard on September 19, 2017, he testified that she was initially happy and smiling and that when he brought up the September 11th incident she became withdrawn and appeared strained. On cross-examination he stated that in talking about the incident, Ms. Voisard said that she thought Appellant's comment was made in a joking manner. Ms. Voisard did not testify in the hearing, and therefore it is not possible to interpret the basis for her demeanor during this conversation with Mr. Zimmerman.

When questioned regarding the importance of employee honesty, as it related to Ex. 4, and the possible violation of CSR 16-29 D, Mr. Zimmerman testified that the Communications Center has a lot of security issues, including personal information of employees, as well as sensitive information regarding travel activities at DIA, especially because of their relationship with law enforcement and with security at DIA regarding dignitaries and others coming through DIA with special requirements.

Counsel for Appellant elicited testimony from Mr. Zimmerman that Ms. Cramer had made complaints about other employees in the past; that he would have to look at a situation involving a threat of violence before deciding whether to remove a person because of a threat; that if he knew a person was about to do something he would remove the person; that he did not remove Appellant; that Appellant continued in his position as supervisor of the Communications Center; that Appellant did not know an investigation was ongoing until served with the Contemplation of Discipline letter on October 11th; that he believed he asked Appellant if he told Ms. Voisard he was going to punch her in the face; and that after further explanation Appellant stated that he could have made that statement to Ms. Voisard. Regarding E.O. 112, Mr. Zimmerman testified that it was not his responsibility to decide whether a comment violated that Order, that it was his duty to determine what had happened, and for others including the City Attorney to decide whether a violation had occurred. Ex's. K, L, M and N, e-mails dated in October of 2017, following notice to Appellant of the Contemplation of Discipline, sent by Appellant to Mr. Zimmerman regarding possible incidents of threats made by employees, were all identified and admitted. Mr. Zimmerman found that these incidents did not constitute threats of violence.

Karla Pierce, Assistant Director, City Attorney's Office, Employment and Labor Law Section, was called to testify by the Agency. She testified that the duties of her office include giving advice to managers with the City, but that they do not give legal advice to employees. She identified Ex. 3 as an e-mail message dated October 14, 2017, directed to the City Help Desk, a link for people asking questions, which was brought to her attention by another City Attorney the same day it was received. She noted that the e-mail address from which it was sent was not a City e-mail, and that she could not identify the sender, Mr. Mancuso, as a city employee. She stated that she interpreted the e-mail to be asking for advice regarding Executive Order 112 on behalf of the sender of the e-mail, Mr. Mancuso. On October 17, 2017, Ms. Pierce received what she described as a really odd telephone call from Mr. Mancuso. Without initially identifying himself, Mr. Mancuso asked if employees were put on investigatory leave regarding alleged workplace violence charges. Ms. Pierce stated that her reply was to ask who the caller was. After giving his name, Mr. Mancuso again asked about Executive Order 112, and Ms. Pierce again explained to him that she needed to know who he was, and whether he was a manager or supervisor with the City. She then explained that she needed to know the particulars of the event about which Mr. Mancuso was calling. Upon explaining that he was calling about a joke that had been made about violence in the workplace, Ms. Pierce realized that he was calling about a current investigation, and she asked him if he were calling about a situation in which he was involved. When he replied that he was, she informed Mr. Mancuso that his call was not appropriate, that they gave advice from the employer side to managers and not to employees, and that she could not give him legal advice regarding his personal situation. Mr. Mancuso apologized and said he hoped he did not get her in a bind by calling for advice.

During the direct examination of Ms. Pierce, Counsel for Appellant objected to the entirety of her testimony based on a claim of attorney/client privilege between Ms. Pierce and Appellant Mancuso, who had called seeking legal advice. Counsel for Appellant contended that the privilege was created by the failure of Ms. Pierce to immediately end the conversation upon learning that Appellant was a supervisor calling about his personal situation. The objection

was overruled, and that ruling is affirmed. The evidence herein shows that by his e-mail, Ex. 3, and by his phone call to Ms. Pierce, Appellant was seeking legal advice without initially identifying himself. The record shows that Ms. Pierce questioned Appellant to determine both who he was and about what situation he was calling. The record further shows that upon learning that Appellant was calling about a personal situation, Ms. Pierce ended the conversation telling Appellant they did not give advice to either employees or managers regarding personal situations in which they were involved.

During his cross-examination of Ms. Pierce, Appellant's Counsel elicited testimony that no one from the City Attorney's office responded to Appellant regarding his e-mail, Ex. 3, to the Help Desk. Ms. Pierce testified that City Attorney Shelby Felton informed her regarding Ex. 3, and that Human Resources and the Airport were contacted, and it was learned that the e-mail was regarding an existing situation at the Airport. Ms. Pierce testified that Appellant called her directly, saying her name had been given to him, and that he was told that she could answer his questions. Ms. Pierce testified that she interrupted him and asked who he was, and that he initially gave his first name. Ms. Pierce stated that Appellant continued to question her about Executive Order 112 and how it worked and whether employees were placed on investigatory leave, and that she continued to question him about his role. Ms. Pierce agreed that the conversation continued with Appellant attempting to ask questions and with her asking Appellant what situation he was calling about. Ms. Pierce then realized about what situation he was calling, at which point she informed him that she could not talk to him about a personal situation, and that it was not appropriate for him to call their office seeking advice, and for him not to call again. Appellant then apologized.

Dave LaPorte, Senior Vice-President for Operations, DIA, testified that he is responsible for police, fire, security, communications center training, and land side operations at Denver International Airport. He stated that he made the disciplinary decision to terminate Appellant Mancuso, after reviewing the audio recording of the November 2, 2017, disciplinary interview with Appellant, and the written record of the investigation, and that Ex. 5 was his finding. He stated that Appellant violated CSR 16-29 G by failing to disclose that he was talking about his own case, both in his e-mail to the Help Desk and in his call to the City Attorney's office, that the e-mail Ex. 3 was deceptive because Appellant made it appear he was talking about one of his employees, and the phone call was deceptive because he did not initially disclose who he was and the true purpose of his call, and that he was talking about himself.

LaPorte further found that Appellant's comments on September 11, 2017, violated CSR 16-29 I in that the 2017 Performance Goals, contained in Ex. 7, refer to Interpersonal Skills and Professional Behavior, at the bottom of p. 2 of Ex. 7, since the evidence he listened to and read showed that his co-workers were visibly and noticeably shaken by his comments, both initially and in their discussions with Mr. Zimmerman during his investigation, and he found their reactions problematic, and that there was not a good relationship with his co-workers.

LaPorte also found that Appellant violated CSR 16-29 R as it related to Executive Order 112, because he was intimidating in his conduct by saying he wanted to punch someone in the face, and if anyone reported his comment they would lose their card-playing privileges. He testified that he could not tolerate a supervisor who engages in intimidating behavior in leading a team in a security environment. He stated that he considered Appellant's contention that his alleged threat to punch another employee in the face was "joking", but that he found the original statement to be a threat, and that Appellant's threat of retaliation by taking away their card playing privileges confirmed for him that Appellant realized that his original threat was wrong. He also said that it was the responsibility of the City and the Airport to have a secure workplace. Finally, he testified that the original comment, followed by the threat of retaliation, with the deceptive e-mail and call to the City Attorney constituted conduct unbecoming a City

employee in violation of CSR 16 T. In reaching his determination that termination was appropriate, he found no evidence in mitigation that would call for a lesser offense. On cross-examination he was questioned regarding Appellant's Ex's. D, E, G, H and I, admitted over the Agency's objections, all of which were examples of disciplinary actions at DIA. Appellant Counsel questioned Mr. LaPorte regarding the initial actions taken regarding Appellant, and Mr. LaPorte agreed that Appellant was not suspended regarding his alleged threats. He further agreed that if there were a security concern he would have possibly pulled the employee off work, and that if a person were a danger he would want to know about that person. On redirect-examination he stated that dishonesty would not necessarily be cause for removal of an employee. The City rested following the completion of the testimony of Mr. LaPorte.

The Appellant was called by Counsel to testify in his own behalf. He testified that he was employed at DIA for over 10 years, and that for eight years he was the Supervisor in the Communications Center. He stated that he took the initiative in asking supervision for permission to play games during slow periods on the night shift to instill camaraderie and to keep the team alert. He testified to the banter that occurred during these periods, and admitted telling Ms. Voisard "You make me want to punch you in the face", during their card game on September 11, 2017, explaining that he was just being funny. He stated that Ms. Cramer was smiling when she responded that his statement could be considered an assault. He also admitted saying that if anyone reported his comment to Ms. Voisard, they could lose their privilege to play games. He testified that he made this statement because management had told him that if the games became a distraction they would have to stop. Appellant said that when no one responded to his comment about their privilege to play games, that he said to deal the cards, and that they continued playing cards that night, as well as on subsequent nights during the following weeks, prior to his being given the Contemplation of Discipline letters on October 11th and 18th, 2017, and his termination on November 30, 2017.

Appellant testified that when he was called into the conference room on October 11th by Mr. Zimmerman, he responded "No" when asked if he told Ms. Voisard he was going to punch her in the face, because it was said as a joke. When Mr. Zimmerman asked him to think about it, he then said yes, and that Mr. Zimmerman then stopped him and told him he was going to be given a Contemplation of Discipline, and that he was not to talk to anyone about the incident or there could be additional disciplinary action. Thereafter, he returned to work. He stated that he sent the e-mails, Ex's. K, L, M and N, to Mr. Zimmerman, because it was unclear to him how to interpret E.O. 112, and also to make Mr. Zimmerman aware of such comments. He stated that he sent Ex. 3, the e-mail to the Help Desk-Department of Law, because he was confused regarding E.O. 112, and that having gotten no response to that e-mail, he called a number listed on the City's website in an attempt to find the workplace violence coordinator. He then called the City Attorney's office on October 17th in a further attempt to obtain information on the application of E.O. 112, and was transferred to Ms. Pierce. He stated that he asked how making a comment in a joking way was violence in the workplace, and that after further questions, he was told that the City was already working on this issue, and that she could not talk to him because he was involved in the situation.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR §19-10 A.1.b, as the direct appeal of a suspension. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

The Agency retains the burden of persuasion, throughout the case, to prove Mancuso violated one or more cited sections of the Career Service Rules, and to prove its decision to dismiss Mancuso from employment complied with CSR 16-41, which states:

> The purpose of discipline is to correct inappropriate behavior or performance, if possible. The type and severity of discipline depends on the gravity of the offense. The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record. The appointing authority shall impose the type and amount of discipline he or she believes is needed to correct the situation and achieve the desired behavior or performance.

The standard by which the Agency must prove its claims is a preponderance of the evidence.

C. Career Service Rule Violations

1. CSR 16-29 A. Neglect of duty or carelessness in performance of duties and responsibilities.

To sustain a violation under CSR 16-29 A, the Agency must establish that Mancuso failed to perform a known duty. In re Gomez, CSA 02-12 (5/14/12), *citing* in re Abbey, CSA 99-09, 6.

Ex. 11, Sec. 1, lists the formal duties for Appellant's position as Airport Communications Center Supervisor. In his testimony Mr. LaPorte referred to his specific findings of Appellant's conduct which he found violated Career Service rules. He did not refer to any conduct which he found specifically violated CSR 16-29 A. Rather, the reasons for discipline set forth were primarily in relation to dishonesty, failure to meet performance standards, failure to maintain satisfactory working relationships, and conduct violative of E.O. 112, violence in the workplace. I find the Agency has failed to show that Appellant violated CSR 16-29 A by failing to perform a known duty as set forth in Sec. 1 of Ex. 11.

To sustain a violation under CSR 16-29 A, the Agency must establish that Appellant failed to perform a known duty. In re Gomez, CSA 02-12 (5/14/12), citing In re Abbey, CSA 99-09, 6, (8/9/10). The only allegations by the Agency under this rule were that Appellant violated generally-stated duties. The Agency did allege violations of other rules relating to performance standards, maintaining satisfactory working relationships, and conduct violative of E.O. 112. When the only allegation under CSR 16-29 A is that the Appellant neglected the same duty as stated under another, specified rule, then this rule becomes an impermissible redundancy of violations. In re Gordon, CSA 10-14, 2 (11/28/14); see also In re Wright, CSA 40-14, 7 (11/17/14). In the absence of a duty not already incorporated within another rule or order, no violation is found. Id.

2. CSR 16-29 D. Any act of dishonesty, which may include, but is not limited to, lying, or improperly altering or falsifying records, examination answers, or work hours.

A violation of this rule includes any knowing misrepresentation made within the employment context. In re Rodriguez, CSA 12-10, 7 (10/22/10); citing In re Mounjim, CSB 87-07A (1/8/09).

City Attorney Karla Pierce testified that she was informed about Ex. 3, the e-mail to the Help Desk, the day it was received. Since Ex. 3 did not show that it came from a City e-mail

address, the sender, Mr. Mancuso, was not immediately known to be a City employee. When she received a telephone call on October 17, 2017, the caller said that she was referred to him, and began asking questions. She stated that she stopped the caller repeatedly, asking him to identify himself. Appellant did give his name, and upon learning that he was a City supervisor, she informed him that her office could not give advice in such situations.

Since Ex. 3 shows that it was from Robert Mancuso, he cannot be considered to be dishonest or lying in sending this e-mail, since he does not hide his identity. Nor does the sending of the e-mail from his personal account constitute dishonesty, since he thereby avoided performing personal business using City equipment. The phrasing of the language in Ex. 3 refers to the sender having "…heard an employee make a statement from another employee which implied violence." The e-mail then characterizes the "statement" as being light-hearted, causing laughter, and being understood as a joke. The e-mail then seeks information regarding the interpretation of E.O. 112, and whether "…any comment of violence even in a joke is considered an act of violence."

Having received no response to his e-mail, Appellant placed a telephone call to the City, and eventually reached Ms. Pierce, as noted above, and immediately began asking for an interpretation of E.O. 112. Since Appellant did give his name when asked, and did admit that he was calling about an incident in which he was involved, he cannot be considered to have lied. Nor do I find that his statement of the issue in the third person constitutes falsifying of the record in his attempt to understand how E.O. 112 was interpreted. Appellant's knowledge of charges against him had occurred only two days before the sending of Ex. 3. Having been stopped from providing any explanation of the incident to Mr. Zimmerman, after responding to him that he could have told Ms. Voisard that he was going to punch her in the face, the Appellant was apparently attempting to understand the charges against him. When there was no response to his Ex. 3 e-mail, he placed the telephone call to the City Attorney, again in an attempt to understand the charges against him. The fact that Mancuso did not open this conversation by giving his name and his position with the City to Ms. Pierce is not by itself evidence of lying. When asked for his name he provided it, as well as informing Ms. Pierce of his City position when asked. At this point Ms. Pierce ended the conversation by telling Appellant that she could not give him advice, and Mr. Mancuso apologized and told Ms. Pierce he hoped he had not gotten her in a bind by calling her. I therefore find that Appellant did not violate CSR 16-29 D by lying, nor did he falsify information or records in his attempts to understand the charges against him.

3. <u>CSR 16-29 G.1. Failing to meet established standards of performance including either qualitative or quantitative standards.</u>

Airport Communication Center Supervisor 2017 Performance Goals state in relevant part:

> <u>Interpersonal Skills and Professional Behavior</u>
>
> Maintains open, honest, and transparent communication; maintains a positive and approachable attitude; works with others to achieve goals; fosters commitment and team spirit; adapts quickly to change; maintains a standard of ethical conduct and understands the impact of violating these standards on an organization, self, and others; is trustworthy; ask questions when clarification is needed; demonstrates responsible behavior; and complies with all section, airport, and city rules and regulations.

Mr. LaPorte testified that Appellant violated this CSR by his actions in attempting to gain information regarding the Contemplation of Discipline letters, Ex's. 2 and 4, by sending an e-mail, Ex. 3, to the City Help Desk, in which he failed to disclose that he was talking about his own case, and by failing to promptly disclose his identity as a City supervisor when he called the City Attorney's Office and spoke with Ms. Pierce.

Mr. LaPorte testified that he determined that there was a violation of this CSR based on his determination the Appellant was lying and falsifying information by his sending of the e-mail, Ex. 3, to the help desk, and by his contacting the City Attorney's office on October 17, 2017. I assume this finding by Mr. LaPorte refers to the language regarding maintaining open, honest, and transparent communication. Having found that Appellant's conduct in sending the e-mail, Ex. 3, and in calling the City Attorney's office, did not violate CSR 16-29 D, above, I find that it does not violate Appellant's 2017 performance goals.

4. **CSR 16-29 I. Failure to maintain satisfactory working relationships with co-workers and other individuals the employee interacts with as part of his job.**

Mr. LaPorte testified that in his review of the investigatory record he found that Appellant's co-workers were shaken, both at the time of the threat to punch Ms. Voisard in the face and his comment that the employees could lose their card playing privileges if his comment were reported, and during the investigation by Mr. Zimmerman into the September 11th incident.

The testimony of Ms. Cramer and of Mr. Dohoney support a finding that they were upset by the comment to Ms. Voisard and the comment that if his threat were reported that they could lose their privileges. The extent of their concern is somewhat limited by their admissions that the initial "threat" was said in a light-hearted manner, and that neither they, nor Ms. Voisard, who told Mr. Zimmerman that the "threat" was made in a joking manner, felt personally threatened by the comment.

I find that there is sufficient evidence to support a finding of a violation of CSR 16-29 I. Appellant's actions on September 11th were contrary to the maintaining of satisfactory working relationships with co-workers. Further, Appellant had been formally apprised of expectations of his performance as a supervisor both in Ex. 9, a Memorandum of Instruction, and in Ex. 8, a 2017 Performance Improvement Plan. Appellant's contention that his September 11th comment to Ms. Voisard was intended as a "joke" is not dispositive of his issue, since the issue is not his intention, but is the manner in which the comment was received. Ms. Voisard told Mr. Zimmerman that Appellant's comment was made in a joking manner, and Ms. Cramer testified similarly, and that there was banter during card games and many people made jokes, but she also testified that when she questioned Appellant regarding his comment he became angry and threatened retaliation. Mr. Dohoney, while stating that he did not feel personally threatened, also said that he did not know if he could work with Mr. Mancuso in the future because emotions in the workplace were not good. The fact that the other employees were at least somewhat offended by Appellant's attempted joke is sufficient to show a negative effect on working relationships.

5. **CSR 16-29 R. Conduct which violates the Career Service Rules, the City Charter, the Denver Revised Municipal Code, Executive Orders, written departmental or agency regulations, policies or rules, or any other applicable legal authority**

as it pertains to:

Executive Order No. 112: Violence in the City Workplace

2.0 Policy: Violence has no place in any of the City and County of Denver's work locations or at any City sponsored event, and is strictly prohibited…City employees who perpetuate violence, whether on-duty or off-duty…may be subject to disciplinary action, up to and including dismissal, and possible criminal action.

3.0 Definitions: Violence is defined, but not limited to:

(b) the actual or attempted: threatening behavior, verbal abuse, intimidation, harassment, obscene telephone calls or communications through a computer system, swearing at or shouting at, stalking.

Memorandum No. 112A - Examples of unacceptable behavior that is prohibited by the Executive Order:

1.0 The following conduct will not be tolerated…

a. Intimidating, threatening or hostile behaviors…

b. Jokes or comments regarding violent acts, which are perceived to be a threat of harm

I find that Appellant violated CSR 16-29 R, as it relates to Executive Order No. 112, by his statements in the card game on September 11, 2017. Even if intended as a joke, the initial comment constituted a threat of violence. Thereafter, when Appellant was told that his comment could be a threat of violence, his reply constituted a threat of reprisal.

6. CSR 16-29 T. Conduct which is or could foreseeably:

1. Be prejudicial to the good order and effectiveness of the department or agency;

2. Bring disrepute on or compromise the integrity of the City; or

3. Be unbecoming of a City employee.

In finding a violation of this CSR 16-29-T Mr. LaPorte referred to Appellant's threat to Ms. Voisard and the threat of retaliation if his threat was reported to management. Having found above that these statements were violative of CSR 16-29 R as "jokes" regarding violence, I find that they also constitute conduct unbecoming of a City Employee, establishing a violation of this rule.

V. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-41 to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules.

A. Seriousness of the proven offenses

Mr. LaPorte testified that he found the September 11th threat to Ms. Voisard and the threat of retaliation sufficiently serious to support termination. He based this conclusion in part on his finding that Appellant failed to take responsibility for his conduct during the pre-disciplinary meeting on November 2, 2017, during which Appellant contended he was joking, and gave examples of such conduct in the workplace. While in his testimony Mr. LaPorte stated that he reviewed the audio recording of the November 2nd pre-disciplinary meeting, that recording is not in evidence. The record therefore has only the characterization of this meeting contained in Ex. 5, the dismissal letter, where again Mr. Mancuso admits to saying to Ms. Voisard "I'm going to punch you in the face", while contending that the statement was a joke.

Since Appellant, prior to the November 2nd meeting, had not been given an opportunity to give his understanding of the September 11th incident, his contentions in the November 2nd meeting are not in themselves a failure to accept responsibility. Similarly, in both his Ex. 3 e-mail, and his phone call to Ms. Pierce, Appellant admitted making the threat to punch Ms. Voisard, but characterized it as a joke, while seeking clarification on the interpretation of E.O. 112.

At the hearing herein, Appellant again admitted making the threat to punch Ms. Voisard. Given the seriousness of the penalty of termination, Appellant was and is rightfully concerned for his future employment because of the charges against him. His demeanor at the hearing herein evidenced his recognition of the seriousness of his actions, and his willingness to correct those actions. While Appellant's conduct should not be excused, the penalty of termination is excessive, given his work record, admission of wrongdoing, and the totality of the circumstances presented at hearing. In re Burkhardt, CSB 81-07 (8/28/08); *see also* In re Ford, CSB 48-14A, 8-9 (12/17/15); In re Jenkins, CSB 54-14A (11/9/15).

B. Prior Record

As noted above, Appellant's work record includes a Memorandum of Instruction, Ex. 9, dated 2/7/14, and a February 2017Performance Improvement Plan, Ex. 8, which Appellant completed successfully, both regarding work relations with other employees; and a Supervisor Evaluation (PEPR) dated 2/10/16, Ex. 11, in which Appellant is rated below expectations in Professionalism and Interpersonal Relationships, regarding behavior reported as unprofessional, demeaning, and condescending when speaking with employees. In a Supervisor Evaluation PEPR, Ex. 17, dated 2/10/17, Appellant was rated Successful, with a rating of 4 in Performance Duties, a 3 in Interpersonal Skills & Professional Behavior, and a 2 in Leadership of the employees in his department. Other PEPR's were not introduced into evidence. Such a record indicates past improvement in Interpersonal Skills and Professional Behavior, as evidenced by the evaluator's comments on Outcome 2 in Ex. 17, with the need for a continuing focus on this skill.

C. Likelihood of Reform

Based on my observations of Appellant during the hearing herein, I consider it probable that he comprehends the importance of not making so-called jokes which could be misinterpreted. I believe his prior record as a successful employee show that he is capable of performing work for the City.

D. Other factors.

I find that the conduct of Appellant, while not *de minimus*, was in fact taken as a threat of violence, sufficient to warrant a substantial penalty. I will therefore order a suspension of 30 days for this violation. In re Lacombe, CSB 10-14A, (7/16/15).

VI. ORDER

The Agency's decision to dismiss Robert Mancuso from his employment on November 30, 2017, is MODIFIED. Appellant Mancuso's penalty assessment is modified to a 30-day suspension, and he is ordered reinstated to his position, and shall be made whole by the Agency for all lost wages and benefits (including those associated with his time in service), save for the suspended 30 days.

DONE March 27, 2018.

Daniel C. Ferguson
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 § 21-23, within fourteen (14) calendar days after the date of mailing of the Hearing Officer's decision, as stated in the decision's certificate of delivery. See Career Service Rules at www.denvergov.org/csa. **All petitions for review must be filed with the following:**

Career Service Board
c/o OHR Executive Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: CareerServiceBoardAppeals@denvergov.org

Career Service Hearing Office
201 W. Colfax, Dept. 412, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND opposing parties or their representatives, if any.