HEARING OFFICER, CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Appeal No. 55-02

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEAL OF:

Appellant: LEEROY MANUEL MARTINEZ

And

Agency: DEPARTMENT OF PUBLIC WORKS, TRAFFIC OPERATIONS DIVISION, and The City and County of Denver, a municipal corporation.

CONCLUSION

Appellant did not prove, by a preponderance of the evidence, the Agency violated Executive Order No. 112 Violence in the Workplace. The Agency did prove, by a preponderance of the evidence, that Appellant violated Career Service Rule(s) (CSR) and that Appellant's dismissal was reasonably related to the severity of the offense.

NATURE OF APPEAL

Appellant, LeeRoy Manuel Martinez, a 24 year Career Service Employee, has appealed his dismissal from the Agency. Although no CSR, Charter Amendment or Ordinance need be alleged in a dismissal appeal, Appellant listed that Executive Order No. 112 Violence in the Workplace was violated by the Agency. Appellant also objects to the dismissal process in general stating:

- That job terminations are inherently unconstitutional in that they deny procedural and substantive due process.
- An exercise in futility because the fact finder (Hearing Officer) is an employee of Denver.
- Impossible because there are no rules of procedure but a procedure in name only.
- Flawed because Denver does not allow a terminated employee an attorney of that employee's choice.

These objections were listed in a document titled Partial Response to All Orders to Respond, filed in the Hearings Office on April 8th 2002, with an Amended Appeal and other documents.

The Agency dismissed Appellant for misconduct for alleged violation of the following CSR:

Section 16-50 Discipline and Termination

A. Causes for dismissal.

The following may be cause for dismissal of a career service employee. A lesser discipline other than dismissal may be imposed where circumstances warrant. It is impossible to identify within this rule all conduct, which may be cause for discipline. Therefore, this is not an exhaustive list.

3) Dishonesty, including but not limited to: altering or falsifying official records or examinations; accepting, soliciting, or making a bribe; lying to superiors or falsifying records with respect to official duties, including work duties, disciplinary actions, or false reporting of work hours; using official position or authority for personal profit or advantage, including kickbacks; or any other act of dishonesty not specifically listed in this paragraph.

6) Carrying a weapon onto city property or to a work location without written permission of the employee's appointing authority.

7) Refusing to comply with the orders of an authorized supervisor or refusing to do assigned work which the employee is capable of performing.

8) Threatening, fighting with, intimidating, or abusing employees or officers of the City and County of Denver for any reason, including but not limited to: intimidation, or retaliation against an individual who has been identified as a witness, as a party, or as a representative of any party to any hearing or investigation relative to any disciplinary procedure, or a violation of a city, state, or federal rule, regulation or law.

18) Conduct which violates an executive order which has been adopted by the Career Service Board.

Executive Order No. 112 states in pertinent part:

Executive Order No. 112, Violence in the Workplace

II. General Policy

Violence, or threat of violence, has no place in any of the City and County of Denver's work locations. It is the goal of the City and County of Denver to rid work sites of violent behavior or the threat of such behavior. It is the shared obligation of all employees, law enforcement agencies, and employee organizations to individually and jointly act to prevent or defuse actual or implied violent behavior at work.

The City and County of Denver is committed to maintain a safe work environment free from all forms of violence and harassment.

Violence, or threat of violence, by or against any employee of the City and County of Denver is unacceptable and contrary to city policy, and will subject the perpetrator to serious disciplinary action and possible criminal charges. The city will work with law enforcement to aid in the prosecution of anyone inside or outside of the organization who commits violent acts against employees.

To ensure and affirm a safe, violence-free workplace, the following will not be tolerated.

A. Intimidating, threatening or hostile behaviors, physical assault, vandalism, arson, sabotage, unauthorized use of weapons, bringing unauthorized weapons onto city property or other acts of this type clearly inappropriate to the workplace.

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

C. Encouraging others to engage in the negative behaviors outlined in this policy.

VII. Disciplinary Action

Any violation of this policy by employees, including a first offense, will result in disciplinary action, up to and including dismissal.

20) Conduct not specifically identified herein may also be cause for dismissal.

Section 16-51 Causes for Progressive Discipline.

A. The following unacceptable behavior or performance may be cause for progressive discipline. Under appropriate circumstances, immediate dismissal may be warranted. Failure to correct behavior or committing additional violations after progressive discipline has been taken may subject the employee to further discipline, up to and including dismissal from employment. It is impossible to identify within this rule all potential grounds for disciplinary action; therefore, this is not an exclusive list.

2) Failure to meet established standards of performance including either qualitative or quantitative standards.

- See Executive Order No. 112, Violence in the Workplace; and Public Works Rules and Regulations all of which are cited herein.

- As a Crew Supervisor, your Performance enhancement Program (PEP) Plan, signed by you on April 24, 2001 states, in pertinent part:

  "SUPERVISION/RULES, REGULATIONS & TRAINING: ... Insure that all assigned personnel are aware of and adhere to ALL Safety Rules and Regulations, as well as all Rules and Regulations of CSA, Public Works, and Traffic Operations Division."

  "INTERPERSONAL RELATIONSHIPS & CUSTOMER SERVICE: cooperate with, communicate with, and assist in making things work smoothly between others (including co-workers, Supervisors, and the Public) at all times. Establish and maintain a working environment conductive to team work and high moral (sic). Reflect a positive image to the citizens and the Department. Treat co-workers, management, and the public with respect at all times."

  "SAFETY: Follow safety rules and administer the safety program for your crew. Create and maintain a safe working environment by following Departmental safety rules, by making sure all City, Public Works, and Divisional policies are followed and enforced. ..."

4) Failure to maintain satisfactory working relationships with co-workers, other City and County employees or the public.

5) Failure to observe departmental regulations.

Public Works Rules and Regulations state in pertinent part:

1. <u>WORK PLACE ENVIRONMENT</u>

The success of Public Works depends on employees who establish and maintain a proper business atmosphere. This includes maintaining a high level of customer service, and respect for co-workers and citizens. ...

A. Workplace Violence

Violence, or threat of violence, is not acceptable and will not be tolerated in any of the City and County of Denver's work locations. It is the goal of the City and County of Denver to rid the work sites of violent behavior or threats of such behavior. It is each employee's responsibility to prevent or defuse actual or implied violent behavior at work. To ensure and affirm a safe, violence-free workplace, the following will not be tolerated:

1) Intimidating, threatening or hostile behaviors, physical assault, vandalism, arson, sabotage, unauthorized use of weapons, bringing unauthorized weapons onto city property or other acts of this type clearly inappropriate to the workplace.

2) Jokes or comments regarding violent acts, which are reasonably perceived to be a threat of imminent harm. ...

3) Encouraging others to engage in the negative behaviors outlined in Executive Order No. 112.

The City and County of Denver, Department of Public Works is committed to maintain a safe work environment free from all forms of violence.

C. Harassment

The Department of Public Works takes very seriously the right of each employee to work in an environment that respects the individuality of employees. Our work force reflects the diversity of the Denver community and that diversity is an asset to our ability to provide excellent service to our City. All employees are expected to treat co-workers with dignity and respect. Harassment of any kind will not be tolerated.

G. Public Contact

Employees must conduct themselves with courtesy and helpfulness to fellow employees and the public at all times. Employees will project a positive attitude concerning the merits of any job on

which they are working and will refer any persons with questions or complaints about a job ot their supervisor.

10) Failure to comply with the instructions of an authorized supervisor.

11) Conduct not specifically identified herein may also be cause for progressive discipline.

INTRODUCTION

A hearing on this appeal was held before Michael A. Lassota, Hearing Officer for the Career Service Board. Appellant was present and represented by Jack Kintzele, Esq. The Agency was represented by Assistant City Attorney Karla Pierce, Esq., with Robert Kochevar serving as advisory witness for the Agency.

The following witnesses testified at the hearing: Frank Andrew Mora, John G. Morales, David Lopez, Mark Ramirez, Phillip J. Torres, Steven Brendlinger, Robert Kochevar, Janice Meese, Cruz Vigil, Alonzo Gonzales, Anthony Aragon, John Cereceres, LeeRoy Martinez.

Exhibits 1-15 and 17-23 were admitted into evidence.

ISSUES ON APPEAL

Whether the Agency violated Executive Order No. 112, Violence in the Workplace.

Whether the Agency proved, by a preponderance of the evidence, that Appellant violated CSR 16-50 A, 3, 6, 7, 8, 18 Violence in the Workplace, 20, and 16-51 A, 2, 4, 5 Public Works Rules and Regulations, 10, and11.

Whether Appellant's dismissal was reasonably related to the severity of the offense.

JURISDICTION

The action which gave rise to the appeal, Appellant's dismissal, occurred on March 5th, 2002. Appellant filed his appeal with the Hearings Office on March 11th, 2002. The appeal has been timely filed under CSR 19-22 and under CSR 19-27, I have the authority to affirm, reverse, or modify the actions of the Agency.[1] I have no jurisdiction

[1] CSR 19-22 Time Limitation and Form of Appeal

a) Time Limitation

1) Every appeal shall be filed at the office of the Career Service Authority within ten (10) calendar days from the date of the notice action, which is the subject of the appeal.

over Appellant's objections to the dismissal process. Even if I did, they would fail because they were not timely filed as explained below.

During the hearing, there was testimony regarding alleged discrimination against Appellant by the Agency. Appellant filed the original appeal (1st) with the Hearings Office on March 11th, 2002 without any allegation of discrimination. He was the only person to sign it. I was provided with a copy of Exhibit 19 date stamped in the Hearings Office on March 18th, 2002 and signed by Appellant and his counsel that same day. Exhibit 19 is a copy of another original appeal (2nd) form, but different from the one filed March 11th. This one claims discrimination based on unequal treatment and erroneous findings. A review of the file revealed an Amended Appeal (3rd), filed by Appellant in the Hearings Office on April 8th, 2002 dated and signed by Appellant and his attorney dated March 18th, 2002 adding yet another discrimination claim. This one claims discrimination in the termination process and severity of the sanction/penalty. It is puzzling to me that the 2nd original appeal adding the discrimination claim and the 3rd appeal were signed and dated the same day, but only the 2nd appeal was filed on March 18th. Regardless, it has been ruled previously that an amendment to the appeal adding issues must still be filed within ten days of the date of notice of the action, which gave rise to the appeal to comply with CSR 19-22. *In the Matter of the Appeal of: Walter Don Kelley,* Amended Pre-Hearing Order, Jan, 23rd, 2002.

To be timely filed, the 2nd appeal and the 3rd appeal must have been received in the Hearings Office, by the close of business, on March 15th, 2002. The rule is clear regarding this ten day period. There is no three day grace period for mailing as argued by Appellant. This same reasoning holds true regarding Appellant's objections to the dismissal process.

The timely filing of a notice of appeal is a jurisdictional requirement. *Widener v.District Court*, 200 Colo. 398, 615 P.2d 33 (1980). If the notice of appeal is not filed within the time limits, the Hearing Officer loses jurisdiction over the matter. It can even be raised *sua sponte* by the court because it must first determine that it has subject matter jurisdiction over a case before it can exercise power over the matter. Cf. *Triebelhorn v. Turanski*, 149 Colo. 558, 561, 370 P.2d 757, 759 (1962) ([T]he defense of lack of jurisdiction over the subject matter can be raised at any time, even for the first time in this Court, and [ ] a trial court which in fact lacks jurisdiction over the subject matter cannot acquire jurisdiction over the subject matter even though the parties expressly or impliedly consent thereto."). Therefore, the previously stated issues are the only issues meeting jurisdictional requirements in this appeal.

CSR § 19-27 provides:

> The Hearings Officer shall issue a decision in writing affirming, modifying, or reversing the action, which gave rise to the appeal. This decision shall contain findings on each issue and shall be binding upon all parties.

FINDINGS OF FACT

On February 1st, 2002, at approximately 3:55 p.m., in front of the time clock at the Traffic Operations Division, an altercation occurred between Appellant and Frank Mora, and John Morales. A line forms on each side of the time clock for employees to clock-out. Mora was first in line to clock-out on the south side of the time clock and Morales was second in line to clock-out, but standing first in line on the north side of the time clock. Many other men were sitting or standing in line behind Mora or Morales waiting their turn to clock-out

While Mora and Morales were sitting on benches waiting for the 4:00 p.m. clock-out time Appellant entered the area, walked up to the time clock, took his timecard out of its slot in the timecard holder and attempted to clock-out first, ignoring the men in line. Mora told Appellant to go to the back of the line. The altercation should have ended right then, especially given Appellant's supervisory training in preventing workplace violence. Instead, Appellant took his timecard out of the time clock as if to comply with Mora's directions, but then put it back in the time clock. Appellant's demeanor was aggressive and Mora felt intimidated by the encounter. Morales also noticed this aggressive demeanor of Appellant.

Morales observed that Appellant was not acting like himself, that his attitude during the altercation was changed, he was more aggressive than normal. Morales told Appellant that if he had the nerve to cut in line, then have the balls to punch out. Morales then took Appellant's card out of the time clock and put it in Appellant's chest. During this encounter words were exchanged and some shoving, arm to arm, between the two. The altercation appeared to end when Appellant clocked-out. He was first, Morales second and Mora third. At the time clock and while walking down the hallway, Appellant exclaimed "viva la Zoot," Zoot being Appellant's nickname.

Appellant was first to walk down the hall towards the door to leave the building, Morales was about ten feet behind him and Mora about ten feet behind Morales. Near the end of the hall Morales saw Appellant open a knife with a black handle, and a serrated blade about five inches long. Appellant again exclaimed "viva la Zoot." Mora also saw the knife, but did not hear Appellant say anything. It is unknown whether Appellant opened the knife with a one handed motion or used two hands. Both Morales and Mora saw the knife cupped in Appellant's right hand with the blade resting on the inside of Appellant's right forearm. Morales had seen this knife before. It was not a utility knife issued for work use. Mora described the knife as about ten inches in total length, and that he had seen Appellant with one like it before, although he did not know if this was the same knife. Morales and Mora were the only two men to see Appellant in the hallway that day with the knife held up against the inside of his arm. Appellant collects knives and has brought knives to work with him before.

After Morales left the building and before Mora left the building, Appellant turned and faced Morales pointing the knife at him. There was approximately fifteen feet of space between the two men. Appellant stayed in this position until Morales past by

him. The knife was still in Appellant's right hand, so Morales went by him on the left to get to his car. Appellant then approached his car, which was parked next to Morales, driver door to driver door. Appellant still had the knife in his right hand. No one else witnessed this confrontation. Appellant did not deny it during his testimony and admitted to pulling a knife on Morales during his pre-disciplinary hearing.

Morales reported this incident to his supervisor, Larry Romero, on Monday February 4th, 2002, who reported the incident to his supervisor, Phillip Torres. Steven Bredlinger, Public Works Safety Director, and Jan Meese, Acting Director of Human Resources for Public Works conducted an investigation of the altercation. As a result, Appellant was put on investigatory leave the same day. The altercation was not reported to police.

On February 14th, 2002 a letter of official notification disciplinary action was being contemplated against Appellant was mailed to Appellant. In that letter Appellant was told why discipline was being contemplated against him. Also, in that letter, a pre-disciplinary meeting was scheduled for February 25th, 2002 at 9:30 a.m., in the Office of the Manager of Public Works, City and County Building, 1437 Bannock Street, Room # 379. The meeting conformed to the constitutional requirements set forth in *Cleveland Board of Education v. Loudermill*, et. al., 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 494, 53 U.S.L.W. 4306 (1985).

Appellant arrived at the meeting first and seated himself in a way that others would have to go by him to sit down. The meeting was conducted by Jan Meese, with Robert Kochevar also present. Appellant was first asked if he understood his right to have representation, to which Appellant replied: "Yes I do, and to get a representative would make me look guilty in my way of thinking." Appellant went on to tell his side of the story most of which was about his good work record, which was never an issue. He cast blame on upper management for not being present to keep the altercation from happening in the first place.

Near the end of the meeting Appellant produced three knives to demonstrate the knives he had on February 1st. Meese and Kochevar were immediately in fear for their safety because Appellant was between them and the door. Appellant, with one hand, flipped open the knife Meese and Kochevar recognized as one like the one described by Morales and Mora. Appellant said it was only to show them it was one he was told to stop carrying to work by Phil Torres, however Meese and Kochevar were intimidated and frightened by it. And, it was against the CSR, city policy, and the law to have it there. Appellant admitted that it was the same knife he had on him "that day when I pulled out a knife on John Morales." This incident was reported to Building Security but not to the police.

Appellant was dismissed from employment on March 5th, 2002, by letter mailed to him that same day.

DISCUSSION

The City Charter, §C5.25 (4) and CSR §2-104 (b)(4) require the Hearing Officer to determine the facts in this matter " de novo". The Colorado Courts have held that this requires an independent fact-finding hearing considering evidence submitted at the *de novo* hearing and a resolution of the factual disputes. *Turner v.Rossmiller*, 35 Co. A. 329, 535 P.2d 751 (Colo. App., 1975).

The party advancing a position or claim, in an administrative hearing like this one, has the burden of proving that position by a "preponderance of the evidence". To prove something by a "preponderance of the evidence" means to prove that it is more probably true than not (Colorado Civil Jury Instruction, 3:1).[2] The number of witnesses testifying to a particular fact does not necessarily determine the weight of the evidence (Colorado Civic Jury Instruction 3:5).[3] The ultimate credibility of the witnesses and the weight given their testimony are within the province of the Administrative Law Judge or Hearing Officer. *Charnes v. Lobato,* 743 P.2d 27 (Colo. 1987). As the trier of fact, the Hearing Officer determines the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

In the original appeal, Appellant alleged the Agency Violated Executive Order No. 112. Appellant offered no witnesses or testimony during his case in chief to support this allegation. Appellant's only attempt to prove this allegation was through cross-examination of Agency witnesses.

In Section III of Executive Order No. 112 there is a requirement to call police.

Section III Criminal Incident Coordination states in part:

A. In immediate emergency situations: Call 911

As with any other emergency involving fire, violence, or medical incidents, the first thought and action is to call 911 and report as many details as possible so that the appropriate emergency response units can be dispatched.

B. Next Step – immediately contact the

1. Building Security,

2. Division/Department/Office Manager involved, and

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[2] The notes on use of Instruction 3.1 state: Generally, in all civil cases, "the burden of proof shall be by a preponderance of the evidence,..." citing C.R.S. § 13-25-127.

[3] The content of this instruction was approved as an instruction in *Swain v. Swanson*, 118 Colo. 509, 197 P.2d 624 (1948). The rule stated is also supported by *Green v. Taney*, 7 Colo. 278, 3P. 423 (1884) and C. McCormick, EVIDENCE § 339, at 957 (E. Cleary 3 ded, 1984).

3. Agency personnel and safety officers.

Section IV Non-Emergency Incident states in part:

A. In a non-emergency situation, but one in which an employee is determined by the supervisor to be hostile, disruptive, or otherwise a potential risk to the health and safety of other employees, the public, or themselves, a supervisor may take one or any combination of the most appropriate of the following actions:

3. Remove the employee from the workplace by placing him or her on investigatory leave until a further determination of facts can be made.

During cross-examination Steven Bredlinger testified that during his investigation he did not call police. By that time any immediate danger had passed, so there was no need to call police. Bredlinger did what he felt appropriate; he put Appellant on investigatory leave. Also, during cross-examination about the pre-disciplinary meeting, Kochevar and Meese were asked if they called the police. They did not because they could not. Both testified they were fearful for their safety, did not know what Appellant might do, did not want to escalate the situation and Appellant blocked the only door out of the room. Both testified Building Security was notified of the incident as soon as Appellant left. The allegation the Agency violated Executive Order No. 112 is denied.

The Agency alleged Appellant violated CSR's and Executive Order No. 112 Violence in the Workplace, which was the basis for his dismissal. Therefore, the Agency has the burden of proving Appellant violated CSR's and Executive Order No. 112 by a preponderance of the evidence.

CSR 16-50 A, 3, Dishonesty, is alleged to have been violated by Appellant by the Agency. Robert Kochevar testified that Appellant's cutting in line at the time clock was an unspecified act of dishonesty. That these actions were not like that of a supervisor because more was expected of supervisors, a higher standard of behavior. It was a supervisor's job to make sure this sort of thing did not happen. Appellant did not refute any of this testimony, he stated the reason he needed to cut in line; his "Lady" was having car trouble. Appellant questioned why upper management was not there to watch the time clock; stating that if upper management was there, the altercation would not have taken place. Kochevar testified that Appellant, as a supervisor, was just like any other supervisor in that it was part of his job to make sure altercations of the type Appellant was involved in did not occur. The allegation Appellant violated this CSR is affirmed.

Appellant testified during the pre-disciplinary meeting and during the hearing he did not comply with CSR 16-50 A 6: Carrying a weapon onto city property. In the "pre-dis," Appellant said: "Phil (Torres) took me into the office and he stopped me from carrying this one here, this little big one." At this point, Appellant flipped the knife open

with one hand. Appellant was opening a black handled knife with a serrated blade, described by both Kochevar and Jan Meese as the one they believed used by Appellant during the altercation and pointed at Morales. Appellant admitted pulling a knife on John Morales after the part of the altercation at the time clock had ended. The knife in Appellant's possession, during the altercation, is a violation of this CSR. The allegation Appellant violated this CSR is affirmed.

The altercation at the time clock, and pulling the knife on John Morales are clear violations of CSR 16-50 A, 8: Threatening, fighting with, intimidation or abusing employees or officers of the City and County of Denver for any reason.... The altercation at the time clock was intimidating to Mora and Morales as they both testified to. Everyone who was waiting their turn to clock out were abused by Appellant's cutting in line. A Crew Supervisor himself, Appellant should have known better, regardless of whether people do it all the time, as he testified to. Kochevar testified it was part of Appellant's job to set an example for the rest of the employees.

Morales testified that having the knife pointed at him by Appellant made him feel like "one of them was gonna [sic] get hurt." Under these facts, the act of pointing a knife at another person is threatening and intimidating without any further action. The same is true for bringing to and flipping open the knife during the pre-disciplinary meeting. Appellant arrived first and seated himself in a way that put him between Meese, Kochevar and the only door in and out of the room. Both Meese and Kochevar testified they were frightened by this action and both clearly believed it was done to intimidate them. The allegation Appellant violated this CSR is affirmed because of the intimidation to Morales when Appellant pointed the knife at him.

16-50 A, 18: Conduct which violates an executive order, which has been adopted by the Career Service Board. The alleged violations of the rule pertain to Executive Order No. 112 – Violence in the Workplace (Order). Specifically, Appellant violated section II A of this Order by engaging in "intimidating, threatening, or hostile behaviors" during the previously described altercation. The knife was an unauthorized weapon brought onto city property, also a violation of Section II A.

II B. Jokes or comments regarding violent acts, which are reasonably perceived to be a threat of imminent harm. The testimony of Morales supports a finding that Appellant violated this section by his actions during the altercation.

II C. Encouraging others to engage in negative behaviors outlined in this policy. Kochevar testified Appellant violated this section of the rule by challenging Mora and Morales during the altercation. This testimony supports a finding Appellant violated this section of the Order. The allegation Appellant violated 16-50 A, 18 is affirmed.

16-50 A 20; was not violated by Appellant. This is a catch-all provision that does not apply given the facts of this appeal. The allegation Appellant violated this CSR is denied.

Next the Agency alleges Appellant violated Section 16-51 Causes for Progressive Discipline. Section A 2 refers to failure to meet established standards of performance including either qualitative or quantitative standards. These are the standards found in Agency Rules and Regulations, Executive Orders and the employee Performance Enhancement Program Plan (PEP). Appellant signed his most recent PEP on April 24th, 2001.

Kochevar testified that Appellant violated his PEP plan and this section of the CSR by becoming involved in the altercation. Appellant did not adhere to safety rules, all Rules and Regulations of the Career Service Authority, Public Works, and Traffic Operations Division. Also, Appellant did not cooperate with, communicate with, and assist in making things work smoothly between others at all times as required by his PEP. Similarly, he did not treat co-workers, or management with respect as his PEP required. Finally he did not create and maintain a safe working environment by becoming involved in the altercation. The allegation Appellant violated this section of the CSR is affirmed.

The reasons why Appellant violated Sections 16-51 4, failure to maintain satisfactory working relationships, and 5, failure to observe departmental regulations, have already been explained. The allegation Appellant violated these sections of the CSR is affirmed.

16-51 10, failure to comply with the instructions of an authorized supervisor was violated when Appellant ignored Torres' order to not bring the knife to work with him. The allegation Appellant violated this section of the CSR is affirmed.

16-51 11, is a catch-all provision that does not apply to this appeal. The allegation Appellant violated this section of the CSR is denied.

JUSTNESS OF DISCIPLINE

The Agency must establish, by a preponderance of the evidence, that it had just cause for the disciplinary action. *In the Matter of the Appeal of Vernon Brunzett*, Appeal No. 160-00, Hearing Officer Bruce A. Plotkin, 12-8-00. . Once it has been decided to discipline an employee the Agency has several alternatives ranging from verbal reprimand up to dismissal. Whenever practicable, discipline shall be progressive.[4] The requirement is that discipline be reasonably related to the severity of the offense. *In the Matter of Leamon Taplin*, Appeal No. 35-99, Hearing Officer Michael L. Bieda, 11-22-99. Executive Order No. 112 provides that any violation of the policy prohibiting

[4] RULE 16 DISCIPLINE, states is part:

Section 16-20 Progressive Discipline

2) Whenever practicable, discipline shall be progressive. However, any measure or level of discipline may be used in any given situation as appropriate. This rule must not be interpreted to mean that progressive discipline must be taken before an employee may be dismissed.

violence in the workplace by employees, including a first offense, will result in disciplinary action, up to and including dismissal.

These provisions, along with the CSR violations already described, reflect the seriousness with which workplace violence must be treated. Dismissal of a long-term employee does not occur without due consideration of the gravity of the offense. In this appeal, Appellant instigated the altercation by cutting in line at the time clock. It could have ended with Appellant going to the back of the line when told to by Mora. Instead, Appellant escalated the altercation to the point where Morales felt the need to intervene. Appellant still got his way; he punched out first. However, Appellant did not end the altercation, he exclaimed "viva la Zoot," a signal indicating he had beat them. Then, while walking down the hall, Appellant displayed a knife observable to Morales and Mora. Once outside the building, Appellant pointed that knife at Morales causing Morales to feel like someone was going to be hurt. He admitted pulling the knife on Morales during the pre-disciplinary meeting.

Appellant's behavior during the altercation on February 1st, 2002 and the February 25th pre-disciplinary meeting exhibit his unwillingness to follow the rules regarding violence in the workplace. Because Appellant was not given notice his actions with the knife at the pre-disciplinary meeting could be grounds for discipline, it was not considered as a basis for affirming his dismissal. The altercation alone is a serious offense in which participation is not to be condoned. The Agency had just cause to discipline Appellant, and the degree of discipline is reasonably related to the severity of the offense.

ORDER

The action of the Agency dismissing Appellant from his employment is affirmed.

Dated this 20th day of August, 2002.

Michael A. Lassota
Hearing Officer
Career Service Board