

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

Appeal No. 37-05

DECISION

IN THE MATTER OF THE APPEAL OF:

JEFFREY MESTAS,
Appellant,

vs.

PUBLIC OFFICE BUILDINGS, DEPARTMENT OF GENERAL SERVICES,
Agency,
and the City and County of Denver, a municipal corporation.

I. INTRODUCTION

The Appellant, Mr. Jeffrey Mestas, appeals his employer's decision to terminate his employment on April 24, 2004. A hearing concerning this appeal was conducted on July 25, 2005, before Bruce A. Plotkin, Hearings Officer. The Appellant represented himself. The employer, Public Office Buildings (Agency) was represented by Mindi L. Wright, Esq. The Director of the Agency, Mr. Dan Barbee (Barbee), served as the Agency's advisory witness.

The Appellant testified on his own behalf. The Agency presented Mr. Jon Romero, Mr. Clint Aragon, Mr. James Williamson, and Barbee as its witnesses.

Appellant's exhibits A(1-5) were admitted without objection. Appellant's exhibit A (6-87), and B-E were withdrawn. Exhibit F was denied as untimely and based upon hearsay. Agency exhibits 1-18 were admitted without objection.

II. ISSUES

The following issues were presented for appeal:

1. whether the Appellant violated Career Service Rules (CSR) 16-50 A. 8), 14), 18), or 20); CSR 16-51 A. 4), 5), or 11); CSR 15-10, including Code of Conduct, or Public Office Building Administrative Policies, or Security and Behavior;

2. whether the Appellant violated Executive Order No.112, Violence in the Workplace;
3. if the Appellant violated any of the above-referenced rules or Executive Order, whether the Agency was justified in dismissing the Appellant;
4. whether the Agency unlawfully dismissed the Appellant based upon his disability;
5. whether the Agency unlawfully retaliated against the Appellant;
6. whether the Agency unlawfully harassed the Appellant;
7. if the Agency unlawfully dismissed the Appellant due to his disability, due to harassment or for a retaliatory reason, whether the Appellant is entitled to reinstatement and all back pay and benefits.

III. BACKGROUND

The Agency is responsible for City of Denver building maintenance for over 150 city buildings. The Appellant was employed by the Agency as a supervisor of maintenance in the City and County Building which houses, primarily, the Denver County Court and the Denver District Court. Since criminal prosecutions occur daily in that building, security protocol is critical.

On January 7, 2005, Clint Aragon, Security Services Supervisor for the City and County Building, contacted James Williamson, Assistant Director of the Agency, to notify him several security guards in the City and County Building advised him the previous day they observed the Appellant engage in violent behavior in the building. Consequently, Regina Garcia, analyst specialist for the Agency, investigated their allegations. She gathered witness statements and interviewed several security guards.

According to the Agency, on January 6, 2005 at approximately 4:45 p.m., Margie Maynez, a security guard assigned to the City and County Building, along with another Security Guard, Jon Romero, were on their way to fold flags. The Appellant approached Maynez, the Appellant's ex-girlfriend, and asked her why "that guy stared" at him. The Appellant then asked if she and Romero were dating.

Later, when the Appellant observed Maynez inside another entrance, he entered that door which was marked "no entry." A guard stationed at the door to insure no one entered told the Appellant he could not enter there. Her recollection was "Jeff Mestas came barreling through Delta 9 Doors as if he was totally pissed off. He acted like he didn't hear me tell him he couldn't come through Delta 9 doors." [Exhibit 7]. The Appellant told Maynez he was going to ask Romero directly why Romero kept looking at him and if Romero had a problem with him. The Appellant left, but returned a couple minutes later and kicked two "wet floor" signs in

his path, then asked again where Romero was. The Appellant left briefly, but returned when he saw Maynez talking to a male co-worker and said, "what are you fucking him now? So that is why you do not want to be my girlfriend right?" Maynez replied she would not go back with him because of the way he acted when he got jealous. The Appellant then told her that she was "nothing but a fucking bitch" and left.

Romero was told by his supervisor to relieve guards at another station for bathroom breaks. The Appellant sought him out and approached, walking behind the X-ray machine to where Romero was seated. Romero stated the Appellant stood over him, and loudly asked "do you have a problem with me," and if so they could settle it "right now." Romero said "I don't know you." The Appellant said "you're the one buying that bitch stuff." Romero replied "I don't know what you're talking about," at which point the Appellant left. Romero stated because the Appellant is a "big" man, and stood close over him, he felt threatened by the Appellant. [Exhibit 2].

Marissa Portillo, a security guard stationed with Romero, stated she observed the Appellant approach Romero, and say in a hostile manner, "hey man, do you have a problem with me? I don't like the way you look at me." Portillo felt uncomfortable and left. [Exhibit 1].

The Appellant's view of the events described above by the Agency was recounted in his Exhibit A1-A5. The Appellant stated on January 6, 2005 at the City and County Building, Maynez approached him, rather than the other way around. The Appellant emphasized his relationship with Maynez was that of current boyfriend-girlfriend. He stated Romero had been giving him dirty looks for two weeks, but denies being upset by either Romero or Maynez. His recollection is he told Maynez "I wonder why he looks at me in that manner." He admitted telling Maynez he wished to seek out Romero, but only to ask if he offended Romero in some way. Maynez told him "No, don't do that...he likes me and wants to go out with me, so don't fuck it up for me, that's why he looks at you like that." He left momentarily, but returned almost immediately to ask Maynez "because of my curiosity" what Romero bought for Maynez. When Maynez replied "none of your business" the Appellant said "do you know where he's at, I'll go ask him myself." Then, the Appellant stated he started to leave, noting "there was a 'wet floor' sign fairly close to the rotunda archway, I hit it with my foot and it slid towards the middle of the entrance way. I kept walking and then Ms Maynez shouted at me, she said. 'Hey, what about the floor sign?' I turned and looked and decided to go move the floor sign. I put the toe of my shoe under the sign and attempted to move it with my foot, it flipped over and it slid against the wall. I turned and left."

The Appellant stated later, when he decided to talk to Maynez again, he entered an off-limit entry, but asked the guard if he could enter and was told "yes, go ahead, come on in." The door is unlocked due to fire exit requirements, but no entry is allowed. That is why security guards are posted there.

The Appellant denied demanding to know Romero's whereabouts from Maynez, but instead stated he was looking for a co-worker to show him a hunting magazine. The Appellant stated when he happened upon Romero, he decided it was a good time to ask Romero some questions. According to the Appellant, when he approached Romero he said "I'm having

some concerns on the way you look at me when ever I'm around," and admitted at that moment, Portillo left the area. He then approached to about three feet from Romero who was sitting. Standing over Romero, the Appellant said "if there's a problem we should discuss it now." Romero said nothing. The Appellant then asked "is it because you buy Margie stuff, like the liquor for New Years? I know you gave her that bottle and you brought it in the building in your back pack." Romero said nothing and the Appellant left. He disputed that Portillo's leaving indicated she felt threatened, explaining if she felt a threatening situation, she would not have left her partner alone in a hostile environment. He concludes from this that she was comfortable with his demeanor.

IV. ANALYSIS: AGENCY CLAIMS AGAINST THE APPELLANT

A. CSR 16-50 A. 8) Threatening, fighting with, intimidating or abusing employees or officers of the City and County of Denver...

The Agency's concern here was the Appellant's seeking out and impliedly threatening, and intimidating Romero. "Of grave concern is you aggressively confronted another individual, who by your own admissions may have felt intimidated and threatened because you are a big man and you were standing over him." [Exhibit 1-5]. See also [Barbee testimony]. A fundamental element of this violation is that the threatened individual be an employee or officer of the City and County of Denver. The only evidence regarding Romero's employment status was that he worked in the City and County Building as a security guard for a company named Securitas [Appellant testimony, Exhibit 5], suggesting he is not a city employee. Of the witnesses identified by the Agency [Agency's pre-hearing statement] who may have observed the Appellant's behavior on January 6, 2005, only Maynez, an Agency employee, was undoubtedly an employee of the City and County of Denver; but it was not clear, by a preponderance of the evidence, that she was threatened or intimidated by the Appellant, especially in light of her willingness to speak to him, responsiveness to him, and warning to him not to seek out Romero. Importantly, Dan Barbee, Director of the Agency, did not refer to Maynez' being intimidated by the Appellant as a reason to discipline the Appellant, either in the Agency's notice of termination, [Exhibit 2], or in his testimony. [Barbee testimony]. Therefore, only Romero may have been intimidated by the Appellant, and since the Agency did not establish that Romero was an employee or officer of the City and County of Denver, it failed to establish the Appellant violated CSR 16-50 A. 8).

B. CSR 16-60 A. 14) Failure to use safety devices or failure to observe safety regulations which...jeopardizes the safety of self or others; or results in damage or destruction of City and County property.

The Agency alleged the Appellant breached this rule first by kicking the "wet floor" signs. Barbee explained the Agency has previously been forced to pay settlements for slip-and-fall accidents where such signs were not displayed, thus the Appellant jeopardized the safety of others by kicking then leaving the signs flat on the floor. [Barbee testimony]. Second, the Appellant violated this rule, according to Barbee,

by entering a secured door of a building that is high-risk due to the prosecution and frequent transportation of criminals within, against security protocol, particularly for a supervisor. Third, the Agency claimed the Appellant engaged two security guards in an intimidating manner, so as to occupy one and cause another to leave her station, both of which actions created a potential security breach. [Barbee testimony].

Regarding security protocol, the Agency presented exhibit 11, security regulations for city employees, which reads in pertinent part: "Employees must comply with security procedures each time they enter or exit a building," and "[w]henver they are in uniform, employees should remember that they are representing the City and County of Denver and behave accordingly."

The Appellant responded he didn't kick the sign; it merely fell over when he accidentally tapped it with his foot. [Exhibit A]. However, even if true, the Appellant failed to explain why he left the sign on the floor, creating a potential hazard for the public.

As to the security guard station, the Appellant replied he understood the security requirements of having that door secured against entry, but entered only after receiving permission from the guard there. He further explained it is a rule that is frequently bent, depending on the relationship between the guard and the person seeking entry, particularly for POB workers. [Appellant testimony]. However, even if the guard invited him to enter, as the Appellant stated, as a supervisor, the Appellant is charged not only with enforcing safety rules with his subordinates, but in setting an example for them. [Barbee testimony, Appellant cross-examination]. His failure to follow a critical safety rule he is charged with enforcing, sets a dangerous precedent for his co-workers and others.

At Romero's station, the Appellant admits he sought out Romero after Maynez told him not to, and questioned Romero while standing over him. The Hearings Officer finds the Appellant's claim that he was merely curious to ask Romero what gifts he bought for Maynez is not credible under the circumstances. He first approached Maynez, his girlfriend, about the same information. Maynez not only rejected giving the information, but according to the Appellant, warned him to stay away from Romero, a potential suitor. Nonetheless, the Appellant admitted he approached this potential suitor of his girlfriend and, standing over him behind the X-ray machine, where he should not have been, and in a manner the Appellant admits may have seemed intimidating, asked him the same questions about gifts for his girlfriend. This was not curiosity, it was jealousy that was escalating dangerously. The Appellant's demeanor clearly caused Portillo to flee, albeit as the Appellant pointed out, in violation of her duties, because while the Appellant engaged Romero and in Portillo's absence, the safety of building occupants was jeopardized. For these reasons, the Hearings Officer concludes the Agency has proven the Appellant violated CSR 16-50 A. 14) by a preponderance of the evidence.

C. CSR 16-50 A. 18) Conduct which violates an executive order.

Executive Order 112, Violence in the Work Place, p.1, General Policy: To ensure and affirm a safe, violence-free workplace, the following will not be tolerated. A. Intimidating, threatening, or hostile behaviors...or other acts of this type clearly inappropriate to the workplace.

The Agency claimed the Appellant violated Executive Order No. 112, therefore this rule, by his violent behavior around Maynez, presumably kicking the sign, and his implied threats and intimidation of Romero. [Barbee testimony]. The Appellant acknowledged he was trained in Executive Order No. 112 issues. Regarding the “wet floor sign”, he stated he did not intentionally kick, but only tapped the sign with his foot, then, attempted to pick it up with his foot, accidentally sliding it across the floor. Regarding his questioning Maynez, the Appellant denied he was aggressive toward her.

As previously stated, the circumstances surrounding the events of January 6, 2005 strongly suggest the Appellant was angry and increasingly hostile. Romero testified, and Portillo affirmed, the Appellant went behind the x-ray machine where Romero was posted. Romero credibly testified he was intimidated by the Appellant standing over him, and that the Appellant was trying to threaten him with the following words: “I don’t like the way you look at me.” [Exhibit 8]. Romero also recalled the Appellant issue this warning: “he said if I had a problem with him we could settle it right here, right now.” [Romero testimony]. Even if Romero’s recollection were questionable due to his relationship with Maynez, Portillo’s recollection was not disputed, and she clearly recalled the Appellant’s aggressive actions toward Romero. [Exhibit 8]. Portillo’s description of Maynez’ fears about the Appellant portray the essence of a perpetrator of domestic violence. It was evident the Appellant sought out Maynez, then, not satisfied with her answers, kicked the “wet floor” sign, leaving it flat on the floor. Then when Maynez refused to say where Romero could be found, the Appellant sought Romero to challenge him over the extent of Romero’s relationship with Maynez. These actions were, by a preponderance of the evidence, intimidating, threatening, and hostile toward Romero in derogation of Executive Order No. 112. Therefore, the Agency proved the Appellant violated CSR 16-50 A. 18).

D. CSR 16-50 A) 20) Conduct not specifically identified herein may also be cause for dismissal.

The Agency identified the specific conduct described above as its basis for discipline. Therefore the Hearings Officer declines to apply this rule.

E. CSR 16-51 A. 4) Failure to Maintain satisfactory working relationships with co-workers, other City and County employees, or the public.

The Agency based its finding that the Appellant violated this rule upon his questioning of Maynez and Romero on January 6, 2005. [Barbee testimony]. While it is not clear the Appellant’s working relationship with Maynez was affected by his belligerence, Romero specifically stated he was intimidated and fearful. It was evident

that the Appellant and Romero work in the same location, and as such, share a working relationship. It was also evident that the Appellant damaged that relationship by his hostility toward Romero, as described above. The Appellant was therefore in violation of CSR 16-51 A. 4).

F. CSR 16-51 A. 5) Failure to observe departmental regulations.

Public Office Buildings Administrative Policies, p.7: SECURITY: Employees must follow all special procedures established for entrance to or exit from all City buildings, including walking through metal detectors, and submitting all tools, equipment, briefcases, packages, etc. for inspection. Employees must comply with security procedures each time they enter or exit a building. Page 10: BEHAVIOR: Employees are expected to behave in a professional manner at all times, whether during their regular shift or overtime, and treat the public, building tenants, their co-workers and supervisors with respect.

The Agency's case regarding this rule was largely similar to that for CSR 16-50 A. 14), above. The Appellant failed to follow POB policies concerning his entrance through a secured door, and subsequent entry into a secured area to intimidate Romero and Portillo at their station, in violation of these regulations. In addition, Williamson, the Appellant's second-level supervisor, testified supervisors such as the Appellant are held to a higher standard than subordinates, for upholding security measures. For reasons as stated above, the Hearings Officer finds Portillo's and Romero's testimony more compelling than that of the Appellant, and therefore finds the Appellant failed to follow procedures established for entrance to a City and County building, and moreover, failed to act professionally, all in violation of CSR 16-51 A. 5).

G. CSR 16-51 A. 11) Conduct not specifically identified herein may also be cause for progressive discipline.

The Agency identified the specific conduct described above as its basis for discipline. Therefore, the Hearings Officer declines to apply this rule.

H. CSR 15-10 Employee Conduct

The conduct of every employee during working hours or at any time while representing the agency, department, or City shall reflect credit on the Career Service and the City and County of Denver.

The Agency claimed the Appellant violated this rule by his actions, described above which also resulted in those rule violations. The Agency emphasized the Appellant's role as supervisor heightened his obligations under this rule. [Barbee testimony] The Appellant replied that he refuted each of the Agency's allegations.

The Hearings Officer agrees with the Agency that the Appellant's status as a supervisor places a heightened obligation upon him to set an example by his conduct which will "reflect credit on the Career Service and the City and County of Denver. " The Appellant failed in that obligation in all of the following ways: by his conduct toward Maynez, even if she were not

personally offended or frightened; by his kicking the “wet floor” sign; by entering through a secured door, even after being told not to; and most of all, by threatening and intimidating Romero. These actions reflected poorly on the Career Service and on the City and County of Denver, in violation of CSR 15-10.

V. ANALYSIS: APPELLANT CLAIMS AGAINST THE AGENCY

A. Appellant’s claim that the Agency unlawfully dismissed him based upon his disability.

The Appellant’s only evidence regarding disability discrimination was his testimony that a doctor assessed a thirty pound lifting restriction. [Appellant testimony]. The Appellant did not provide any documentation of the restriction, and more importantly, the restriction was not assessed until after the Agency’s notice of termination. Without making a showing the Agency knew about his disability, the Appellant failed to provide any evidence of disability from which a *prima facie* discrimination case could be established. See, e.g. Sprague v. Thorn Ams., 129 F.3d 1355 (10th Cir., 1997). This claim is therefore dismissed.

B. Appellant’s claim that the Agency unlawfully retaliated against him.

The Appellant’s opening statement claimed the Agency discharged him in retaliation for his role as an employee advocate, but he subsequently provided no evidence of the same either orally, by documentary evidence, or in any other manner. Therefore this claim is dismissed.

C. Appellant’s claim that the Agency unlawfully harassed him.

To establish a *prima facie* case of hostile work environment harassment, a plaintiff must show that, under the totality of the circumstances, (1) the harassment was pervasive or severe enough to alter the terms, conditions, or privilege of employment, and (2) the harassment based upon a protected status. A showing of pervasiveness requires more than a few isolated incidents of racial enmity. A plaintiff must produce evidence to show that the workplace was permeated with discriminatory intimidation, ridicule, and insult sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment. Bloomer v. UPS, 94 Fed. Appx. 820 (10th Cir., 2004). The Appellant provided no evidence of any of the elements described here from which a *prima facie* case may be established. Therefore, this claim is dismissed.

VI. DEGREE OF DISCIPLINE IMPOSED

The test to determine the propriety of discipline is whether the degree of discipline chosen by the Agency was “reasonably related” to the seriousness of the offense, In re Champion, CSA 71-02, 18 (7/31/02), while taking into consideration the employee’s past record. CSR 16-10.

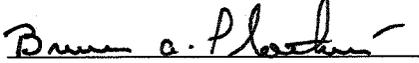
The Agency established that the Appellant's actions toward Maynez were aggressive, and were threatening and intimidating toward Romero. The Hearings Officer is concerned by the level of rage exhibited by the Appellant. Such displays by any employee have no place at work, least of all by a supervisor charged with setting an example for his subordinates. Under these circumstances, the Agency's choice to dismiss the Appellant was within the range of reasonable alternatives available. In addition, however, the Agency also considered the Appellant's past record which indicated increasing hostility toward co-workers.

The Appellant replied that Barbee is not credible because Barbee stated a prior discipline was for insubordination, [Exhibit 3], and the Appellant's personnel record shows no such discipline. The Hearings Officer finds Exhibit 3 establishes a basis for the Agency's finding of insubordination. There was no evidence the written reprimand assessed in Exhibit 3 was appealed or overturned, and therefore is presumptively reliable for the facts therein. Thus, the Appellant's prior disciplinary history does not mitigate against the imposition of dismissal against the Appellant.

VII. CONCLUSION AND ORDER

The Agency established that the Appellant significantly violated provisions of the Career Service Rules by a preponderance of the evidence, including those which, alone, merit termination. In addition, the discipline chosen by the Agency was reasonably related to the seriousness of the offenses, and took into consideration the Appellant's past record. Therefore, the Agency's decision on April 13, 2005 to terminate the Appellant's employment is AFFIRMED.

DONE this 4th day of August, 2005.


Bruce A. Plotkin
Hearings Officer
Career Service Board