

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

Appeal No. 137-03

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

ROBERT D. PEREZ, Appellant,

v.

Agency: Department of General Services., Public Office Buildings Division,
and the City and County of Denver.

INTRODUCTION

For purposes of these Findings and Order, Robert D. Perez shall be referred to as "Appellant." Department of General Services, Public Office Buildings Division shall be referred to as "Department" or "POB." The City and County of Denver shall be referred to as the "City". They will be referred to collectively as the "Agency." The Rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held on November 10 and December 22, 2003. Appellant was represented by Ross Goldsmith, Esq. Robert Nespor, Esq., Assistant City Attorney, represented the Agency with Dan Barbee serving as advisory witness.

The Hearing Officer has considered the following evidence in this decision:

The following witnesses were called by and testified on behalf of the Agency:

Irene Puente, Rosita Duran, Violet Chacon, Daniel Swinarski, Wardale Carlis, Regina Garcia, Dan Barbee

The following witnesses were called by and testified on behalf of the Appellant:

Appellant, Debra Abad, Harry A. Owens, Yvonne Chavez

The following exhibits were offered and admitted into evidence on behalf of the Agency:

1 – 9, 11-12, 16-19, 23

The following exhibits were offered and admitted into evidence on behalf of the Appellant:

B, D

The following exhibits were admitted into evidence by stipulation:

1 – 9, 17-19, 23, B

The following exhibits were offered but not admitted into evidence and therefore not considered in this decision:

10, 13, 22

NATURE OF APPEAL

Appellant is appealing his termination for alleged violations of various provisions of CSR §§16-50 and 16-51. He claims termination is too severe a discipline even if he violated any CSR provisions. Appellant is requesting he be reinstated and be provided with back pay and benefits.

ISSUES ON APPEAL

Whether Appellant violated CSR §§16-50-A. 7), 8), 18), 20) and 16-51 A. 4), 5), 9) and 11)?

If Appellant violated any provisions of CSR §§16-50 or 16-51, was termination warranted or should a lesser discipline have been imposed?

PRELIMINARY MATTERS

Appellant filed a Motion for Discovery on October 29, 2003, two days before the Amended Prehearing Statements were due. The Agency responded on November 3, 2003. On November 4, the Hearing Officer denied the request for discovery on the grounds that it was untimely made, the documentation requested, at least in part, was not reasonably calculated to lead to the discovery of evidence that would be admissible at the hearing, and some of the documentation requested was confidential. The Hearing Officer also noted that a subpoena to produce at least some of the requested documentation was issued to Appellant on October 31 to the Custodian of Records, Department of General Services, returnable at the hearing on this matter, thereby providing Appellant the opportunity to present evidence during the hearing.

At the commencement of the hearing, the Agency moved to quash the subpoena issued to the Custodian of Records for the Department because it was not served upon the in a timely manner and it also requested confidential information regarding persons who were not parties to or witnesses in this case.

The Motion was granted because Appellant admitted that service was untimely as Angie Lee, the designated custodian of records, was not present in her office on October 30 or 31 and did not return to her office until November 3, at which time she was handed a copy of the subpoena by "Rosie," another Department employee, with whom the process server left the subpoena despite

being told that Rosie was not authorized to accept service.

The Agency also made a Motion *in Limine* to limit Appellant's claim of discrimination, which was not raised by Appellant until his Amended Prehearing Statement. The Hearing Officer granted the motion and dismissed the discrimination claim as untimely.

FINDINGS OF FACT

1. Appellant worked for the City for five years. At the time of his termination, he was a custodian working for POB. He held this position for two years. Prior to that, he worked in Street Maintenance.

2. On July 10-11, 2003, he was working the night shift. The shift ended at 1:30 a.m.

3. At 1:29 a.m., Appellant was sitting at Yvonne Chavez's desk at the front of the custodial office in the basement of the City and County Building waiting to clock out for the night. He was the first person in line.

4. Irene Puente, a co-worker, was second in line. She approached Appellant, touched Appellant on the shoulder and told him, "Come on, let's go" or other words that indicated it was time to check out.

5. According to Appellant, Ms. Puente shoved him hard enough to push him across the room. Ms. Puente testified that she simply put her hand on his shoulder and gave him a "little pat, just a touch on the back." She indicated her motion by a wave of her hand.

6. Other witnesses described Ms. Puente's actions as a playful tap/nudge (Rosita Duran) or a push/shove strong enough to move Appellant forward a step or two (Henry Owens).

7. Appellant responded to Ms. Puente's touch by saying, "Don't push me." Ms. Puente touched Appellant again and said, "Come on." Appellant said, "I said, don't push me" and swung his arm up and back at Ms. Puente, striking her in the face.

8. Ms. Puente testified that she did not take Appellant seriously the first time he told her not to push him, but that, after the second time, she knew he was serious.

9. Viola Chacon, who was fourth in line, said "Robert, what did you do that for?" Ms. Chacon stated that Appellant then said to her, "Do you want some of me?" This statement was also testified to by Rosita Duran, who was third in line.

10. Daniel Swinarski, one of the custodial supervisors, was working at his desk in the back of the office. He heard the commotion. He came over to the time clock and told Appellant and Ms. Puente to step aside. He sent Appellant to the back of the office while he kept Ms. Puente in front in order to keep a distance between the two of them. He also asked if there were any witnesses to

the incident. Only Ms. Chacon indicated she had. He told her to write a witness statement when she got home that night and bring it in the next day.

11. Mr. Swinarski went back to his desk to write up an incident report. Appellant kept saying to him, "Can't we talk about this." Mr. Swinarski replied, "Do you think it would really help." Appellant went on to talk about an on-going feud he was having with Ms. Puente about trash removal duties. Mr. Swinarski admitted that he was getting "hot" since Appellant kept interrupting him. Finally, Wardale Carlis, another custodian supervisor who was working at his desk in the back of the office, suggested that Appellant and Ms. Puente be instructed to go home and write up their versions of the events there.

12. Appellant wrote up his version of the incident and turned it in the next day. (Exhibit 6) Ms. Puente did the same. (Exhibit 8)

13. Mr. Swinarski left a note for his supervisor, Steve Pacheco, about what happened and went home. (Exhibit 17) He wrote a more complete statement of the events the next day. (Exhibit 18)

14. Mr. Carlis testified that he heard Appellant apologize to Ms. Puente and say that he hadn't hit her "that hard."

15. Mr. Carlis also wrote up a statement of the events the next day. (Exhibit 19)

16. Ms. Chacon wrote up her observations, as requested by Mr. Swinarski. (Exhibit 8)

17. Ms. Duran also wrote up a statement even though she initially did not tell Mr. Swinarski that she had seen anything. (Exhibit 9) She testified that she wrote up the statement at Ms. Puente's request the next day.

18. Regina Garcia, the Department's Human Resources Specialist, was contacted about the incident while she was on vacation in Breckenridge. She spoke with James Williamson, Assistant Director of POB, and told him to place Appellant and Ms. Puente on investigatory leave,

19. Appellant was placed on investigatory leave on July 16. (Exhibit 4) It was extended on August 13. (Exhibit 5)

20. Ms. Puente was placed on investigatory leave as a result of the incident. She eventually received a verbal warning for her conduct.

21. Ms. Garcia conducted an investigation of the events.

22. Based upon the information discovered during Ms. Garcia's investigation, Dan Barbee, Director of POB, issued a contemplation of discipline letter to Appellant on August 13. (Exhibit 3)

23. The predisciplinary meeting was held on August 21, 2003. Appellant attended, along with his wife. Also present were Mr. Barbee, Ms.

Garcia, and Steve Pacheco, Custodial Services Supervisor. Appellant was given the opportunity to tell his side of the story, but he declined to do so. He was upset at the meeting and made his displeasure known by making inappropriate comments during the meeting.

24. Based upon the information he received from the investigation, the witness statements, Appellant's lack of remorse about striking one co-worker and threatening another, Appellant's history of losing his temper at least one other time, and Appellant's past disciplinary history, Mr. Barbee decided that Appellant's termination from employment was necessary.

25. Mr. Pacheco and Appellant have a "history" between them. Mr. Barbee did not ask Mr. Pacheco for any input about the appropriate level of discipline since Mr. Barbee felt that Mr. Pacheco would be too prejudiced against Appellant in the matter. Mr. Pacheco was at the predisciplinary meeting because he was the Custodial Services Supervisor.

26. The Notice of Discipline was mailed to Appellant on August 22, 2003. (Exhibit 2) Appellant filed his appeal with Hearing Officer in a timely manner on August 25, 2003. (Exhibit 1)

27. Appellant received a written reprimand on April 5, 2002, for conduct that violates the Executive Order on Workplace Violence, failure to maintain satisfactory relationships with co-workers, failure to observe departmental regulations and failure to comply with the instructions of an authorized supervisor. However, the "written reprimand" was not placed in Appellant's personnel file in either the Department or with the Career Service. He received a verbal reprimand on May 2, 2002 for punctuality and attendance. He received another verbal reprimand on March 4, 2003, for abuse of sick leave.

DISCUSSION AND CONCLUSIONS OF LAW

The City Charter C5.25 (4) requires the Hearing Officer to determine the facts in this matter "de novo." This has been determined to mean an independent fact-finding hearing considering evidence submitted at the de novo hearing and resolution of factual disputes. *Turner v. Rossmiller*, 35 Co. App. 329, 532 P.2d 751 (Colo. Ct. of App., 1975)

This is an appeal of a disciplinary action. Therefore, the Agency has the burden of proof.

Appellant is charged with violating several provisions of CSR Rule 16. He is charged with violating several similar provisions: CSR §16-50 A. 8) (threatening, intimidating, fighting with or abusing City employees); CSR § 16-50 A. 18) (conduct which violates an executive order, to wit: Executive Order 112, Violence in the Workplace); CSR §16-50 A. 20) (conduct not specifically identified to wit: violation of CSR §15-110, Preventing Violence in the Workplace); CSR §16-51 A. 4) (failure to maintain a satisfactory working relationship with co-workers); and CSR §16-51 A. 5) (failure to observe department regulations). He is also charged with violating CSR §16-51 A. 7) (refusing to comply with the orders of an authorized supervisor or refusing to do assigned work), CSR §16-51 A. 10) (failure to comply with the instructions of an authorized supervisor) and CSR §16-51 A. 11) (conduct not

specifically identified otherwise).

The Agency failed to get the Departmental policy (Exhibit 13) into evidence. Therefore, the allegation that Appellant failed to observe department regulations, CSR §16-51 A. 5) is dismissed for the failure of proof.

Workplace violence and fighting with or threatening co-workers is very serious. This is reflected by the fact that there are CSR Rules, Executive Orders and Departmental Policies that all deal with this issue. The consequences for violating the workplace violence rules are severe, requiring discipline up through dismissal and possible criminal charges brought against the offender. Bearing all this in mind, the Hearing Officer concludes that Appellant's actions against Ms. Puente do not rise to the level of conduct necessary to establish workplace violence as defined by the Rules or Executive Order No. 112.

The Hearing Officer has reviewed the uncontroverted facts and finds them to be very simple. Ms. Puente placed her hand on Appellant's shoulder. Whether this was just a tap or whether it was a push is irrelevant. Appellant found it to be offensive in either case. Appellant immediately asked her to stop it. Ms. Puente admitted that she did not take this request seriously and touched him again. At that time, Appellant swatted behind himself and hit Ms. Puente, who was standing behind him, on the cheek.

The Agency has not been able to establish that Appellant's actions were meant to intimidate, threaten or abuse Ms. Puente. Further, his actions do not constitute an assault. Assault requires the intent to cause an offensive contact or imminent harm. There is nothing in the record that shows Appellant intended to hit Ms. Puente. Appellant's explanation that he flung his arm back in reaction to and to stop Ms. Puente's offensive touching is credible.

The Agency's other theory is that Appellant's comment to Ms. Chacon ("Do you want some of me?") was either fighting words or somehow meant to intimidate or threaten. The Hearing Officer disagrees. This remark, under the circumstances of this case, does not rise to the level to constitute a meaningful threat of violence.

The violations of CSR §§ 16-50 A. 8), 18) and 20) are therefore dismissed.

Appellant is charged with failing to maintain a satisfactory working relationship with his co-workers, a violation of CSR §16-51 A. 4). This provision does not require the intentional behaviors that rise to the level of intimidation, threats, abuse or fighting. It merely requires that an employee not get along well with his co-workers. It is clear to the Hearing Officer that Appellant was not getting along well with Ms. Puente on the morning of July 11. He was angry with her the entire shift about who was responsible for trash removal and, apparently, insufficiently responsive to her initial comment telling him it was time to clock out. He also talked back to Ms. Chacon and Mr. Swinarski after the initial incident with Ms. Puente. The Hearing Officer finds that Appellant's lack of congeniality is a technical violation of CSR §16-51 A. 4)

Appellant is charged with violating CSR §16-50 A. 7), failure to comply with the orders of his authorized supervisor and refusing to do assigned work which he

is capable of performing. The Agency argues that Appellant's interruptions of Mr. Swinarski meets the gravamen of this charge. The Hearing Officer disagrees. Mr. Swinarski actually is not Appellant's supervisor. There is no evidence that Appellant refused to comply with a direct order of his supervisor or refused to do a job as it assigned to him. This violation is not established.

The violation of CSR §16-51 A. 10), failure to comply with the instruction of an authorized supervisor, is established. Appellant continually interrupted Mr. Swinarski while he was trying to separate Ms. Puente and Appellant and to find out what was going on.

The violation CSR §§16-51 A. 11) is dismissed. Specific provisions of CSR §16-51 A. cover Appellant's conduct.

The next issue before the Hearing Officer is the appropriateness of the discipline. POB argues that termination is appropriate, given Appellant's prior disciplinary history and the zero tolerance policy for workplace violence. Appellant argues it is not given that Ms. Puente, who instigated the confrontation, was not terminated for her participation in the incident.

CSR §16-20 2) encourages progressive discipline "[w]herever practicable." The Rule goes on to state:

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

Similarly, the Rule does not require the interpretation that progressive discipline must be taken before the employee can be terminated.

The Hearing Officer concludes that termination is not appropriate in this case as there has been no showing that Appellant's conduct constitutes workplace violence nor was his failure to get along well with Ms. Puente and his interruptions of Mr. Swinarski egregious enough to justify termination.

The Hearing Officer has considered the fact that Ms. Puente, who was actually the aggressor in this case, having touched Appellant not once, but twice, even after he asked her to stop, got only a written reprimand. The Hearing Officer acknowledges that the Career Service Rules do not use a comparative discipline standard. However, this action by the Department is instructional as to the severity they attached Ms. Puente's behavior.

Because Ms. Puente received only a written reprimand, one might conclude that a written reprimand would be appropriate for Appellant, too, particularly as he was not the aggressor. However, as stated above, the Rules do not require comparative discipline. The Hearing Officer must also look to the Appellant's work history, including his prior disciplines.

In this case, Appellant's prior disciplinary history shows a prior instance of aggressive conduct in April 2002 for which he received some sort of a reprimand.

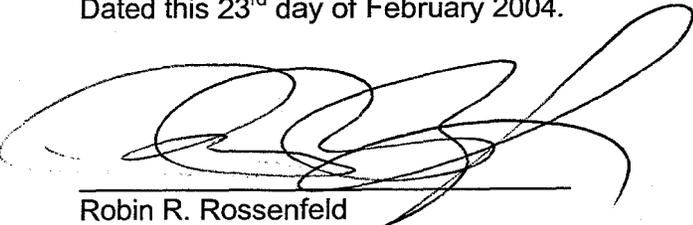
However, the reprimand, even if his supervisor put it in writing, was not placed into Appellant's personnel file with the Department or the CSA, as required by CSR §16-20 1). b) ("Written reprimand, a copy of which shall be placed in the employee's personnel file kept at Career Service Authority." *Emphasis added*). The Department's excuse, that they had no control over the placing of the written reprimand into the CSA file and that it could have been misplaced by someone is insufficient to overcome the Department's burden to show it complied with the rules concerning prior discipline in order for the Hearing Officer to consider it. As a result of this failure of proof, the Hearing Officer is unable to consider the April 2002 event to be written reprimand, and therefore, is not prior discipline under the Rules.

On the other hand, the fact that Appellant has been talked with previously about his behavior towards his co-workers does establish notice to him that such conduct cannot be tolerated. Appellant (and his co-workers) must understand that aggressive behaviors, even those in self-defense, and talking back to his co-workers and supervisors are not acceptable occurrences in the workplace. Given that Appellant has received prior verbal reprimands and warnings about his conduct, a two-month suspension is sufficient to convey this message.

ORDER

Therefore, for the foregoing reasons, the Hearing Officer MODIFIES the appeal as follows: the violations of CSR §§16-51 A. 4) and 10) are SUSTAINED; the violations of CSR §§ 16-50 A. 7), 8), 18), and 20) and 16-51 A. 5) and 11) are REVERSED. Discipline is MODIFIED to a two-month suspension. The Agency is ORDERED to reinstate Appellant to his position of custodian, along with back pay and benefits commensurate herewith.

Dated this 23rd day of February 2004.



Robin R. Rossenfeld
Hearing Officer for the
Career Service Board