DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

LORETTA PERRY-WILBORNE, Appellant,

vs.

DENVER DEPARTMENT OF HUMAN SERVICES,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on April 7, 2014 before Hearing Officer Valerie McNaughton. Appellant was present and represented herself. Assistant City Attorney Andrea Kershner represented the Agency in the appeal. The Agency called Rudolph Rodriguez, Spenser Rudd, Frank Hernandez, Lynnese Ferguson, and Heather Hewitt. Appellant testified on her own behalf.

I. STATEMENT OF THE APPEAL

Appellant Loretta Perry-Wilborne appealed her Dec. 9, 2013 termination, and also alleged race and age discrimination and a whistleblower violation. The race discrimination claim was dismissed by order dated Jan. 6, 2014 based on Appellant's failure to state a prima facie case. The parties stipulated to Agency Exhibit 1. Admitted at hearing were Agency's Exhibits 2 - 4, as well as Appellant's Exhibits A, C, V, W (bottom email), AA-1 to AA-3 and NN.

II. ISSUES FOR HEARING

The issues in this appeal are:

1. Did the Agency establish by a preponderance of the evidence that Appellant's conduct violated the Career Service Rules (CSR) alleged in the disciplinary letter?

2. Did the Agency prove that termination was a reasonable penalty for the proven violations?

3. Did Appellant prove by a preponderance of the evidence that her termination was the result of age discrimination?

4. Did Appellant prove by a preponderance of the evidence that her termination was a violation of the whistleblower ordinance?
III. FINDINGS OF FACT

Appellant Loretta Perry-Wilborne was a Case Management Coordinator III for the Family and Adult Assistance Division of the Denver Department of Human Service. In that capacity, Appellant provides public assistance services for long-term care clients. Appellant served in this position for five years, and has been employed by the city since 2007.

On October 11, 2013, Appellant was called to the lobby at the Denver Human Services Building to speak to a client who needed to see a caseworker. Appellant spent about a minute with the severely disabled client seated in a wheelchair, then walked away in frustration, stating, "I can't deal with this. I know what I can deal with, and I can't deal with this. I refuse to deal with this. I need to find someone else to take care of this." (Exh. 2-22, 2-23.) Appellant walked out of the lobby and into the back office, where she told co-worker Rudolph Rodriguez that she couldn't work with the client because she was "freaking me out." (Rodriguez, 4/7/14, 9:11 am.) After unsuccessfully attempting to have another caseworker meet with the client, she found her supervisor, Lynnette Ferguson. Appellant appeared agitated. In a loud voice, she told Ferguson that she could not handle a client like the one in the lobby, who was like a scene from a scary movie. (Exh. 2-21.) Ferguson assumed that a drunken client had threatened her. She told Appellant they would take care of it. (Exh. 2-18 to 2-23; Appellant, 4/7/14, 1:30 pm; Ferguson, 4/7/14, 10:33 am.)

In the meantime, four employees complained to supervisor Frank Hernandez about Appellant's treatment of the client. Hernandez went to Ferguson's office and stood at the threshold while Appellant spoke to Ferguson. After Appellant left, Hernandez asked to speak to Ferguson. He described what had occurred in the lobby, and was told by Ferguson to get statements from the co-workers who had witnessed the incident.

Appellant came back to Ferguson's office and told her that she needed co-worker Linda Dixon to interview the client. Ferguson told her that she would have to do it herself, since Dixon was in a hearing. Appellant insisted that she could not be in a room with the client because she felt threatened, and asked Ferguson to assist her. Ferguson agreed to go with her to meet with the client.

When they arrived at the lobby, Ferguson was surprised to see a woman in a wheelchair instead of a threatening drunk, as she had expected from Appellant's description. Ferguson escorted them to an interview room. She noted that the client was nonverbal, her hands and body were severely deformed, and that it took patience to communicate with her. The client pointed to her backpack, and Ferguson extracted an alphabet board. Ferguson had never seen one before, but quickly learned that the client communicated by pointing her toes to the letters on the alphabet board. By that means, the client informed them that she was being overcharged on her phone and cable bills. Ferguson conducted all communication with the client. Appellant appeared uncomfortable, and did not look directly at the client. She took notes of the conversation and made copies as requested by Ferguson. Ferguson noticed that the client was shoeless and ill-groomed, and that her chair and clothes were dirty. Thinking she may be neglected, Ferguson instructed Appellant to make a referral to Adult Protective Services. (Ferguson, 4/7/14, 10:33 am; Exh. 2-18.) Appellant completed the task later that day. (Exh. 2-18.)

Those employees included supervisor Joy Martinez, Spenser Rudd, Maisha Smith and Rudolph Rodriguez. (Hernandez, 4/7/14, 10:26 am.)
On Friday, Oct. 18, 2013, Ferguson met with Appellant and asked her why she was uncomfortable with the client. Appellant responded that the client tried to spit on her and run her over with her wheelchair. In her statement accompanying this appeal, Appellant added:

her sticking her tongue out and spit came out of her mouth and her body movements as she disfigured her body and that reminded me of Linda Blair from a scary movie. I was not trying to be insulting but trying to paint a picture of how her body and head was moving.

(Exh. 2-4.)

Ferguson told her she believed Appellant discriminated against a disabled client. Appellant said she would never do that, since she has Bell's palsy and was paralyzed during her pregnancy. She told Ferguson that the client's appearance "freaked her out" and caused her nightmares for two days, since she had never been exposed to a client with severe disabilities. Appellant said she did not want to be alone with this client if she came back. Ferguson replied she would have to assist the client if she was the case management coordinator when the client returned. Ferguson observed that Appellant bore a look of disgust when she described the client's disabilities. She shared with Appellant that her own child was killed in a car accident, and that she would welcome him with open arms if he came back in any shape. She told Appellant that "you never know who your angels may be", and that as disability service providers they need to serve everyone equally. (Ferguson, 4/7/14, 10:33:47 am; Exh. 2-4, 2-5.) Appellant replied that she had done everything she could to assist the client with her case. (Exh. 2-17.) Ferguson testified that this response did not show that Appellant recognized any need for improvement in her conduct.

At hearing, Appellant presented a different version of her encounter with the client. She testified that Rodriguez told her she was needed to help a client in the lobby who could not talk or write. In preparation, she reviewed the file and noted that all of the client's programs had been approved up to 2015, and benefits were being paid. Appellant went to the lobby and knelt before the client to introduce herself. The client twisted her body and worked a lever with her hands. The wheelchair moved straight towards Appellant. Appellant quickly moved out of the way to avoid being hit. She followed the client as the latter continued to move across the lobby. The client then turned the wheelchair and headed back, her head twisted and her tongue out. Appellant left the lobby to seek assistance, saying, "I can't handle it right now. I need help." Behind the counter, she told Rodriguez that she wasn't prepared for the severity of the disability as she watched the client "doing things that I didn't really understand." Appellant found Dee Bell in the long-term care unit and told her a client "tried to run me over, and was spitting and doing things." Bell told her she could not help just then. After asking one other employee, Appellant saw her supervisor emerge from her office. Appellant asked Ferguson for help with a disfigured client who was spitting and trying to run her over. (Appellant, 4/7/14, 1:15 pm; Exh. 2-2.)

Ferguson believes strongly that caseworkers need to serve all clients equally, and that Appellant's conduct was inconsistent with her performance standards. Ferguson reported this incident to her supervisor, Geraldine Bettis, and together they spoke to the Deputy Director, Heather Hewitt. A pre-disciplinary letter was issued, and Appellant attended the pre-disciplinary meeting on Nov. 12, 2013. In her written response, Appellant denied she was afraid of the client's appearance. "I was 'freaked out' a little because of the attempted assault with the wheelchair and her trying to spit on me." (Exh. 2-17.)
In the statement submitted with this appeal, Appellant alleges that she was terminated "because I did not admit that I was unprofessional and rude and disrespectful to the client." "(S)he geared up her motorized wheel chair and almost ran over me but I moved quickly out of the way. Then, she stuck out her extremely long tongue and began to spit and I told her that I would be back ... I told Rudolph Rodriguez that I would be back because I could not handle it and I know what I can handle and I need help ... I was only in the lobby 1 minute or less." (Exh. 2-1.) Appellant admits now that her reaction "would have been more appropriate (if she) was trained properly to interact and to handle situations" with severely disabled clients. "This is clearly a training issue." (Exh. 2-6.)

Appellant also claims that the termination was in retaliation for whistleblower activity. She testified that she and other caseworkers met with Mayor Hancock on Dec. 9, 2011 to discuss their concerns that clients had lost Medicaid benefits because the Agency misplaced 1,300 applications. Appellant contends that this meeting constituted a disclosure of official misconduct under the whistleblower ordinance.

In her appeal statement, Appellant alleges that the meeting was to complain "that production standards were too high and that we were being treated unfairly." (Exh. 2-5.) At hearing, Appellant testified that she and other caseworkers complained that the Agency's faulty business process had caused applications to be misplaced before they were entered into the computer system. As a result, benefits were delayed, and some elderly applicants died before their eligibility determinations could be issued. Appellant sent the Mayor a few emails thereafter, but never again met with anyone in the Mayor's Office. (Appellant, 4/7/14, 1:40 pm.)

Appellant conceded that the Mayor's Office knew of the problems with the Agency's business process before this meeting. She believes that instead of fixing the problem after the prior disclosures, the Agency reacted by setting unrealistic performance standards for processing applications.

The meeting summary prepared in 2011 stated that approximately 1,000 applications were lost and then discovered on the 3rd floor training room in the second quarter of 2011. Appellant testified that applications must be processed 90 days from their filing date. However, they cannot be processed unless they are first entered into the system. The lost applications had not been logged before being misplaced, but were counted as late even though they were not accessible for processing. "Those cases were not scanned into WMS but we were held accountable for them." The summary also complained that "we are working back-logged cases which are the most difficult because many of our (clients) have passed away waiting on DHS to determine eligibility on Medicaid cases." As a result of these working conditions, the caseworkers reported that their performance standards were unrealistic. (Exh. 2-112.)

Appellant prepared her own notes of the meeting with the Mayor. The bullet points included inconsistent rules, unfair production standards, poor morale, unsupportive and hostile supervisors, and having their performance judged by inaccurate data from WMS. Appellant added that "many of our elderly (clients) have died" as a result of management's poor judgment in ordering newer cases to be worked before older cases. (Exh. 2-115.) The topics discussed at that meeting were summarized in a three-page letter to the Mayor. Therein, the caseworkers complained that their performance standards were unfair because the WMS computer system does not credit them with the work they do. The workers also complained of frequent cubicle moves and an unresponsive management team. (Exh. AA-1 to AA-3.) In a longer summary of
the session with the Mayor, all seven itemized topics were complaints about unfair working conditions and evaluations. (Exh. 2-112 to 2-118.)

Deputy Division Director Heather Hewitt issued the Agency's decision in this case. She found that Appellant was aware of her duty to conduct a client interview by virtue of its inclusion in the job specification as an essential duty. Hewitt found that Appellant neglected her duty to serve the client, and failed to recognize that her conduct was in contravention of the Agency's standards to serve its vulnerable clients despite their disabilities. She noted that Appellant refused to see the client by herself, and expressed fear and disgust in describing the client's appearance. Ms. Hewitt concluded that Appellant's lack of self-reflection and willingness to correct her behavior indicated that there was a distinct danger the conduct would be repeated with other clients in the future. She believed that any discipline short of termination would not correct the behavior, would damage the Agency's reputation for providing respectful service, and would be inconsistent with the Agency service standards and policy of nondiscrimination. (Hewitt, 4/7/14, 10:45 am.)

IV. ANALYSIS

The Agency bears the burden to establish the asserted violations of the Career Service Rules by a preponderance of the evidence, and that termination was within the range of discipline that can be imposed under the circumstances. In re Carter, CSB 87-09, 2 (7/1/2010.)

A. VIOLATION OF DISCIPLINARY RULES

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

In order to prove a violation of this rule, an agency must prove an employee failed to perform a job duty he knew he was obligated to perform. In re Serna, CSB 39-12, 3-4 (2/28/14), citing In re Compos, CSB 56-08 (6/18/09).

The Agency found that Appellant neglected her duty to perform an eligibility interview with the disabled client. The term eligibility interview also includes client interviews to provide services after eligibility has been determined. Appellant does not deny the essential facts that she spent less than a minute with the client, and left before learning what the client needed. Appellant admitted that she was "freaked out" by the client's appearance and movements.

In response to this charge, Appellant argues that she left the client without conducting the interview because the client tried to run her over with her wheelchair. Appellant stated that the client used her hands to work the lever, and aimed the wheelchair at her. After Appellant stepped out of the way, the client turned around and drove toward her a second time. (Appellant, 4/7/14, 1:17 pm; Exh. 4.)

No one in the lobby corroborated this version of events. Rodriguez, who had served the client seven or eight times, testified that the client did not have the use of her hands. He also stated that the wheelchair controls are set for operation by the feet, not the hands. Rodriguez had a full view of the encounter, and testified that he did not see the client spit, stick out her tongue, or move her wheelchair toward Appellant. (Rodriguez, 4/7/14, 9:10, 9:22 am.) Case Management Coordinator Spenser Rudd also observed the incident, and affirmed that the client had not moved her wheelchair or tried to spit at her. He noticed that co-workers and
clients in the front area were visibly frustrated and upset by the incident. Rudd stated that after seeing Appellant’s treatment of this client, he does not want to work with her. He reported the incident to his supervisor, Frank Hernandez. (Rudd, 4/7/14, 9:57 - 10:10 am.) Hernandez testified that Appellant’s behavior was disgusting to him in that it caused more hurt to a client who was there based on her serious needs. “We train our members to handle all persons that come to us.” He believes that Appellant’s conduct was a denial of fair treatment because of the client’s disabilities. (Hernandez, 4/7/14, 10:21 am.)

As a Case Management Coordinator III for the past five years, Appellant was on notice that an essential part of her job was conducting client interviews to determine benefits eligibility and provide client service. (Exh. 1-2.) Appellant demonstrated her knowledge of that duty by her efforts to try to find a substitute caseworker to perform the required interview in her place. She told Ferguson that she did not want to interview the client, and only agreed to attend the interview after her supervisor offered to accompany her. At that interview, Appellant took a secondary role and did not interact with the client. I find based on this evidence that Appellant neglected her known duty to conduct an eligibility interview with the client, in violation of this rule.

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

Carelessness is proven by work performance conducted in an unsatisfactory manner. In re Gomez, CSA 02-12, 3 (5/14/12). The Agency alleges that Appellant was careless in spending inadequate time with the client and in failing to communicate with her, both of which are considered necessary parts of providing respectful and effective customer service. (Hewitt, 4/7/14, 11:22 am.)

Appellant admits that she left the client before providing service because she felt emotionally unable to handle the situation by herself. She claims that additional training about severe disabilities would have assisted her to serve the client. It is not clear how training would have prevented the incident, since it was caused by Appellant’s fearful reaction to the client’s appearance. Her description of the client as someone from a scary movie supports the finding that Appellant left before serving the client because of her emotions rather than lack of training, knowledge or exposure to a severely disabled client. A member of the general public may be momentarily startled by a person with profound physical disabilities. However, a Long Term Care coordinator whose work it is to serve the aged and disabled is not justified in abandoning a client without serving her based on an emotional reaction to the client’s appearance. In addition, Appellant did nothing to attempt to regain her composure or provide the needed client service after the initial contact.

Appellant spent less than a minute with the client because she was fearful of her appearance. She left to find someone else to perform her duty, without attempting to learn what the client needed. Her explanation, that the client tried to harm her, was not credible. I find that the evidence established Appellant was careless in the performance of her duty to provide customer service to the client.

3. Failure to do assigned work, §16-60 J.

This rule prohibits an employee from failing to do assigned work which she is capable of performing. In re Mounjim, CSA 87-07, 7 (7/10/08), affirmed CSB 1/8/09. Work that is merely careless does not thereby also violate this rule. In re D’Ambrosio, CSA 98-09, 7 (5/7/10).
Appellant's assignment on Oct. 11, 2013 was to meet with and serve clients referred by counter agents in the Agency customer lobby. In answer to Rodriguez's referral, Appellant responded to the lobby and introduced herself to the client. While Appellant did not complete the assignment, her misconduct is covered by other rules. Section 16-60 J requires proof that an employee failed to do assigned work at all, in contrast with an allegation that the employee performed the work inadequately. I find that the Agency did not establish a violation of this rule.

4. Failure to maintain established standards of performance, § 16-60 K

An employee's failure to meet established standards of performance is proven by evidence of an employee's failure to meet a clearly communicated standard of performance. In re Mounjim, CSA 87-07, 8 (7/10/08).

As a Case Management Coordinator, Appellant's most important duty was to assist clients in obtaining needed services. The Agency cites the essential duties, competencies, knowledge and skills from the job specification for Case Management Coordinator III. The job required Appellant to assist clients in obtaining benefits by conducting eligibility interviews and applying the legal requirements to the facts provided by clients. Necessary competencies in performing this job are empathy, stress tolerance, and sensitivity to individual differences. (Exh. 1-2.)

The Agency determined that Appellant failed to perform that duty in a manner consistent with Agency standards of providing respectful and equal service to all clients regardless of disabilities. They supported that finding with the testimony of administrative assistant Rudolph Rodriguez, who watched the event. He stated that he "witnessed something totally against what DHS stands for ... We are supposed to treat all our customers, no matter what state they're in, with respect and dignity." Rodriguez has served that client many times, and speaks normally to her. He has learned that she communicates using an alphabet board, and that if he does not place it in the right place, she merely re-adjusts it. Rodriguez had no doubt that the client and many others in the lobby overheard Appellant's statement, "I can't handle it", which manifestly referred to the client. He testified that Appellant's behavior was "totally incorrect", and caused him to decide he no longer wants to work with Appellant. (Rodriguez, 4/7/14, 9:40 am.)

Other members of the Long Term Care Unit confirmed that fair and respectful treatment of clients is a clearly communicated standard of performance that is of utmost importance to the Agency. Frank Hernandez testified that his staff was "disgusted" by Appellant's conduct, which he believed was contrary to their training and direction to treat with sensitivity anyone who comes into the lobby. (Hernandez, 4/7/14, 10:23 am.) Spenser Rudd testified that he reported Appellant to his supervisor based on his conclusion that her behavior was "unprofessional for the service that we are trying to provide." (Rudd, 4/7/14, 10:01 am.)

Appellant's job specifications, which include providing respectful and equal service to all clients, establish a performance standard enforceable under this rule, and give Appellant notice of that standard. She failed to provide equal service when she refused to complete a client interview. Appellant failed to be respectful when she made demeaning comments about the client that were overheard by many clients and employees in the lobby. This evidence establishes a violation of § 16-60 J.
5. Failure to observe departmental regulations, § 16-60 K

An agency’s written policies are enforceable under this rule if they are clear, reasonable, and uniformly enforced. In re Leslie, CSA 10-11, 11 (12/5/11). The employee handbook requires employees to seek training "to understand the nature of ... differences with respect to ... physical or mental disability", act professionally, and treat clients with respect. (Exh. 2-3.) For the reasons set forth in the previous section, I find that the Agency established that Appellant failed to treat the client in a respectful manner, in violation of the clear standards set forth in the employee handbook.

6. Threatening, fighting with, intimidating or abusing employees or members of the public, § 16-60 M

The Agency alleges that Appellant violated this rule by abusing a member of the public. Abuse is defined as harsh or insulting treatment or language. In re Leslie, CSA 10-11, 12 (12/5/11), citing In re D’Ambrosio, CSA 98-09, 8 (5/7/10); In re Owens, CSA 69-08, 6 (2/6/09). The most persuasive evidence showed that Appellant became overwhelmed by her own fear of the client, announced she could not handle the situation, and left abruptly. The client did not file a complaint about Appellant's behavior, and there was no evidence that the client heard or understood Appellant's comment that she "can't deal with this". On its face, the evidence does not establish abuse of the client in the sense that term had been interpreted under these rules.

7. Failure to maintain satisfactory work relationships with co-workers or members of the public, § 16-60 O

Conduct violates this rule if it would cause another person standing in the employee's place to believe it would be harmful to others or have a significant impact on their working relationship. In re Williams, CSA 53-08, 5 (12/19/08), citing In re Burghardt, CSB 81-07, 2 (8/28/08); affirmed CSB 5/14/09.

The Agency offered the testimony of four employees, including Appellant's supervisor and the Deputy Director, that this incident caused them to conclude they could no longer work with Appellant. (Rodriguez, Rudd, Ferguson, Hewitt, 4/7/14.) In their view, the conduct showed Appellant lacked understanding of the Agency's core mission to serve a vulnerable population with respect and empathy. Appellant's inability to overcome her shocked reaction to the client's appearance and mannerisms caused a significant negative impact on these working relationships. Appellant did not rebut this credible evidence. I find that a reasonable person in a fellow employee's place could react in a similar manner to Appellant's conduct. The Agency established that Appellant's behavior violated this rule.

8. Conduct violating rules, charter, ordinance, executive order, or other legal authority, § 16-60 Y

This catch-all provision is only applicable if other more specific rules have not been established. In re Gutierrez, CSA 65-11, 8 (8/28/12). Since the Agency did prove several specific rule violations, it is not necessary to decide whether Appellant also violated this rule.
9. Conduct prejudicial to the department or that brings disrepute on the city. § 16-60 Z

Section 16-60 Z is violated by employee conduct that results in actual harm to the agency’s mission, and/or actual harm to the City’s reputation or integrity. In re Jones, CSB 88-09A (9/29/10), affirming In re Jones, CSA 88-09A (5/11/10). Here, the only relevant evidence presented was that of the Deputy Director, who stated that other clients in the lobby witnessed the incident. She added that the Agency “always hears about our treatment of clients”. Clients often talk to other clients about negative treatment, and “that harms us” in maintaining the trust of those served by the Agency.

Evidence of potential harm is insufficient to prove actual harm to the Agency’s mission or to the City’s reputation under this rule. See In re Blan, CSA 41-08, 6 (7/31/08). Hewitt’s testimony proved only that other clients often share negative stories about the Agency with others in the community. This does not amount to evidence of actual harm to the Agency. As a result, this violation was not established at hearing.

B. DEGREE OF PENALTY

Appellant contends that termination was too harsh for an isolated incident, especially in light of her seven-year history of satisfactory client service. The Agency based the decision on Appellant’s refusal to acknowledge that her conduct was contrary to the Agency’s essential mission. Given that fact, it concluded that the behavior was likely to recur. Deputy Director Hewitt also believed that less severe discipline under these circumstances would be inconsistent with the Agency’s hard-won reputation for fair treatment of the disabled. (Hewitt, 4/7/14, 11:24 am.)

I find it significant that Appellant had been performing these duties for five years before this incident. During that time, she was on notice of both the nature of the clients and of the division’s philosophy of service. Instead, Appellant gave way to her emotions and left the client in the lobby without serving her. Thereafter, Appellant justified her conduct as self-defense, a claim not supported by the witnesses in the lobby. She claimed that she had not been trained to handle severely disabled clients, and was unfamiliar with alphabet boards as a communication tool. However, the alphabet board did not appear during the one-minute incident that is the basis for this discipline. The board was first seen during the subsequent client interview, and Appellant is not being charged with any conduct related to the board. Further, all other workers who encountered the client learned about the board by simply watching the client point to letters with her toe. None of them had any training or previous familiarity with the board.

As these disciplinary proceedings continued, Appellant presented an increasingly vivid account of the client’s behavior and appearance. At the pre-hearing meeting, Appellant stated that the client stretched her ten-inch tongue toward her face, and then came at her in her wheelchair. She discounted her comment about Linda Blair and a scary movie as a private conversation with her supervisor. On the contrary, their meeting was in the office and was confined to her service to this client. At the hearing, Appellant continued to deny that her conduct failed to meet Agency standards of client service.

The Agency was required to impose the type of discipline needed to achieve the desired behavior. The decision-maker reasonably concluded that no lesser discipline would correct the behavior. I find that the decision to terminate was within the range of discipline that could be
imposed by a reasonable administrator based on the proven rule violations.

C. AGE DISCRIMINATION CLAIM

In support of her age discrimination claim, Appellant testified that Ferguson disciplined only three employees, including her, and that all three were over the age of 40. Ferguson was not the deciding official in this action. Further, Appellant presented no evidence of the circumstances or employment history of the other employees disciplined. Without evidence that she was treated differently than similarly situated employees outside the protected age group, or any other evidence of discriminatory intent, Appellant failed to satisfy her burden to prove that element of a prima facie case of age discrimination. See St. Croix v. University of Colorado Health Sciences Center, 166 P.3d 230, 237 (2007), citing Aramburu v. Boeing Co., 112 F.3d 1398, 1404 (10th Cir. 1997).

D. CLAIM UNDER WHISTLEBLOWER PROTECTION ORDINANCE

A claim under the whistleblower ordinance is raised by allegations that a supervisor imposed or threatened an adverse employment action on account of an employee's disclosure of information about official misconduct. In re Wehmhoeter, CSA 02-08, 4 (2/14/08); D.R.M.C. § 2-106 et. seq.

The appeal alleges that Appellant and other caseworkers acted as whistleblowers when they met with Mayor Hancock in 2011 to report that "the production standards were too high and that we were being treated unfairly". (Exh. 2-5.) Appellant testified that they also complained about the computer system's failure to accurately record Medicare applications, which led to 1,300 lost Medicare applications and denial of benefits to those who qualified. She presented no evidence that the computer defects were the result of official misconduct; i.e., fraud, waste, or violation of law or rules, as necessary to establish a whistleblower violation. D.R.M.C. § 2-107(d). Appellant conceded at hearing that management was aware of these problems before their 2011 meeting. Thus, it is doubtful that the communication could be characterized as a disclosure within the meaning of the whistleblower ordinance. The Oxford English Dictionary defines a disclosure as "the action of making new or secret information known." http://www.oxforddictionaries.com/definition/english/disclosure. More importantly, contemporaneous summaries prepared by Appellant and the caseworkers are convincing evidence that the employee complaints centered on unfair working conditions, rather than a matter of public concern. See In re Harrison, CSA 55-07, 66 (6/17/10); Methvin v. Bartholomew, 971 P.2d 151 (Alaska 1998); Pickering v. Bd. of Educ., 391 US 563 (1968). (Exhs. 2-5, 2-112, 2-115; AA.) Appellant failed to prove that she disclosed official misconduct, and therefore this claim must be dismissed as unproven.

Order

Based on the foregoing findings of fact and conclusions of law, the following orders are entered:

1. The Agency's disciplinary action imposed on December 9, 2013 is AFFIRMED.
2. Appellant's age discrimination and whistleblower claims are DISMISSED.

Dated this 22nd day of May, 2014.

Valerie McNaughton
Career Service Hearing Officer