CAREER SERVICE BOARD  
CITY AND COUNTY OF DENVER, COLORADO  

Appeal No. 56-11A  

DECISION AND ORDER  

IN THE MATTER OF THE APPEAL OF:  

[Redacted Name]  
Appellant/Petitioner,  

vs.  

DEPARTMENT OF SAFETY, TRAFFIC OPERATIONS BUREAU,  
and the City and County of Denver, a municipal corporation,  

Agency/Respondent.  

[Redacted Name] was employed as a civilian employee within the Department of Safety as a supervisor for the Denver Police Department’s (DPD) Photo Enforcement Unit (PEU), within DPD’s Traffic Operations Bureau. While her technical knowledge and willingness to work long hours was never questioned, significant problems arose concerning her management skills. Eventually, these problems brought DPD management to believe that [Redacted Name] could no longer effectively supervise.  

The Agency sought [Redacted Name] discharge, alleging violations of eight separate Career Service Rules. The Hearing Officer, after conducting a three-day hearing, sustained four rules violations and affirmed the Agency’s discharge of [Redacted Name]. [Redacted Name] filed a timely appeal of that decision. In her Petition for Review, [Redacted Name] alleges that the Hearing Officer’s decision relied upon erroneous rules interpretations, set bad policy precedent, and was not supported by sufficient evidence. In her brief, [Redacted Name] alleges that the Hearing Officer erred by: sustaining four rules violations, failing to find that [Redacted Name] had been subjected to gender discrimination; finding that discharge was an appropriate punishment; and, evidently, accepting the testimony of a witness whom [Redacted Name] believed to be unqualified. We have considered the Hearing Officer’s determinations as well as the arguments advanced by the parties. We affirm the Hearing Officer.  

I. Rules Violations  

A. CSR 16-60A – Neglect of Duty  

The Hearing Officer determined that [Redacted Name] violated this rule by not having issued PEPERS in a timely fashion during the periods of 2008-2010. As noted by the Hearing Officer
Hearing Exhibit 15-8 (part of PEPR) clearly put on notice that timely completion of PEPRs was expected of her. The record is replete with uncontroverted evidence indicating that supervisors did not complete PEPRs in a timely manner. Similarly, employees supervised by also testified that they did not receive PEPRs in a timely fashion. The record supports the Hearing Officer’s conclusion that failed to complete PEPRs in a timely fashion, as required of her in her PEP, and does not appear to argue to the contrary.

Instead, she claims that the Hearing Officer’s finding on this charge amounts to a misinterpretation of Rule 16-60A; however, we think that has misinterpreted the Hearing Officer’s decision by taking a line from that decision out of context. Specifically, argues that the Hearing Officer found that had “neglected her duty to issue PEPRs from 2008 to 2010 in violation of this rule.” then proceeds in her brief to demonstrate that did, in fact, issue PEPRs. The Hearing Officer plainly did not find a rules violation because PEPRs were never issued, but rather, because they were issued late, and even then, the PEPR’s were essentially worthless to those to whom the PEPRs were issued because refused to provide any feedback to the employees concerning their work performance in the PEPRs, as is plainly contemplated by the PEPR process.

In sum, we do not believe that the Hearing Officer misinterpreted CSR 16-60A. The record conclusively demonstrates that neglected to complete required PEPRs in a timely, meaningful fashion.

B. CSR 16-60J – Failure To Comply With Lawful Orders

The Hearing Officer also found that violated this rule. In doing so, the Hearing Officer noted that “[t]he undisputed evidence indicates that the Agency stated its clear behavioral expectations in the February 2011 PIP to handle staff communications with sensitivity and respect.” (Hearing Officer decision p. 11) The Hearing Officer then cited to specific examples in the record where failed to act in conformance with this directive. claims that the Hearing Officer misinterpreted this rule. Again, we disagree.

First, the Hearing Officer specifically determined that the language contained in the February 2011 PIP issued to constituted an order because it “stated clear behavioral expectations” “to handle staff communications with sensitivity and respect.” (Hearing Officer’s Decision p.11) We believe that that this language does, in fact, constitute an “order.” It is not a mere suggestion; and it is much more than a vague aspirational goal. The language plainly and unequivocally directs to handle her communications with her staff with dignity and respect. We do not find these terms to be vague or overly broad. We believe that a specific directive to handle communications with dignity and respect constitutes a valid, reasonable order to act in a certain way, or to refrain from acting in ways inconsistent with the concepts of dignity and respect.

The Hearing Officer then noted specific examples of conduct which violated this order, including an incident where angrily confronted an employee and another incident where assigned three employees extra work just to be, in her

...cites to the Hearing Officer decision in In Re Purdy, CSA 67-11. We note that this case is currently pending our review and that, in any event, it is a Hearing Officer’s decision which, of course, does not bind this Board.
words, an “asshole.” argues that neither of these incidents were committed under circumstances demonstrating willfulness; and, therefore, were not a violation of CSR 16-60J. We believe is mistaken.

First, we adopt a common sense definition of “willful.” We believe that circumstances demonstrating willfulness are circumstances demonstrating that the action taken was taken intentionally, knowingly, or voluntarily; knowingly without justifiable excuse. Black’s Law Dictionary, Fifth Edition, p. 1434. Second, we note that there does not need to be an admission of willfulness before willfulness can be found; willfulness can often be inferred from the conduct in question. U.S. v. Guidry, 199 F.3d 1150 (10th Cir. 1999); N.A.S. Import Corp. v. Chenson Enterprises, 968 F.2d 250, 252 (2d Cir. 1992). Here, we have exhibiting deliberate, angry conduct (to which, according to her brief at p. 13, she admitted the error of her ways) and deliberate, intentional conduct committed for no other reason than she wanted to be an “asshole.”

We agree with the Hearing Officer that angry exchange with Ms. Chavez, as well as her piling additional work on her employees just to be an “asshole”, was the antithesis of communications with sensitivity and respect, in violation of clear directives dictated by the terms of her PIP. Consequently, the Hearing Officer did not misinterpret CSR 16-60J.

C. CSR 16-60K- Failing To Meet established Performance Standards.

The Hearing Officer determined that violated this rule. She found that PEP set out standards for both timeliness and implementation of PEPRs for her subordinates. She further found that did not contest that her own PEPR identified clear standards of performance for implementation of PEPRs for her subordinates. Based on the findings that knew what was required of her regarding PEPRs the Hearing Officer found that did not meet those standards in that she did not issue PEPRs in a timely fashion and that she did not provide feedback in the PEPRs that she wrote. claims that this finding is not supported by sufficient evidence.

For us to overturn the Hearing Officer on this ground, we must determine that the Hearing Officer’s finding is clearly erroneous. A finding is clearly erroneous when it is unsupported by substantial evidence in the record considered as a whole; that is, where the factual finding has no support in the record. In the matter of the Appeal of: Ryan Murphy and the Department of Safety, No. 09-11A. We find considerable evidence in the record supporting the Hearing Officer’s finding. First, as we noted above, there is really no dispute that did not submit PEPRs in a timely fashion. her employees, and her supervisors, confirmed this with their testimony. Second, every employee that testified about his or her PEPR testified that the PEPRs contained no feedback from and that resisted in providing feedback, even after being specifically asked to provide feedback. There are no grounds for overturning the Hearing Officer’s findings and conclusion on this rules violation.

D. CSR 16-60O- Failure To Maintain Satisfactory Work Relationships

The Hearing Officer was not obligated to, and obviously did not accept explanation that her “asshole” comment was made in an effort to “lighten up” a tense workplace. Given the treatment she afforded her subordinates as evidenced by their testimony at the hearing, the Hearing Officer and the employees appeared justified in taking at her word.
The Hearing Officer determined that [redacted] violated this rule. In doing so, the hearing officer, in her opinion, cited to a litany of noxious conduct on the part of [redacted], which created a toxic work environment affecting her employees. The incidents recounted by the hearing officer are all supported by record evidence. Because all of these incidents have support in the record, and because [redacted] in her brief, does not actually claim that she did not commit the misconduct, which the hearing officer relied upon to support this rule violation, we will not disturb her findings on this issue.

II. Discrimination

To the extent that [redacted] contests the finding concerning the above-referenced 16-600 violation, it is only in the context of alleging that her having received discipline for the conduct amounted to gender discrimination. We believe the record does not demonstrate that [redacted] was discriminated against on account of her gender.

In an effort to prove discrimination, [redacted] claims that the record demonstrates that similarly situated male employees committed misconduct similar to hers but did not receive discipline. For an employee to be "similarly situated" an employee must deal with the same supervisor and be subject to the same standards governing performance evaluation and discipline. Employment circumstances, such as work histories, should also be analyzed. Further, similarly situated employees must have been disciplined for conduct of comparable seriousness for any disparate treatment to be relevant. McGowan v. City of Eufaula, 472 F.3d 736, 745 (10th Cir. 2006).

[redacted] on pages 23-25 of her brief, makes numerous references to instances where, she claims, her supervisors acted like she did, but were not disciplined for their actions. But [redacted] supervisors are not similarly situated to her. See, e.g., Jones v. Denver Post Corp., 203 F.3d 748, 753 (10th Cir. 2000) (plaintiff's attempt to prove discriminatory pretext by showing that his supervisor engaged in the same conduct he did, not "legally relevant" because non-supervisory and supervisory employees "cannot be deemed similarly situated in a disciplinary matter such as this one" at 203 F.3d 753); Furaus v. Citadel Communications Corp., 168 Fed.Appx. 257, 2006 WL 218175 (10th Cir. 2006) at **4 ("We agree with the district judge and the defendant that comparison to Mr. Gettler is inappropriate, since he was plaintiff's direct supervisor and so not similarly situated."). In addition, we note that [redacted] supervisors are not subject to the same standards governing performance and evaluation as was [redacted] Her supervisors were all uniformed police officers, members of the City's Classified Service. Their conduct is governed by the Denver Police Operations Manual and discipline is subject to review by Denver's Civil Service Commission and not this Board.

We also do not believe that the record demonstrates that these police officers consistently failed to perform supervisory obligations or that they created a toxic work environment on a consistent basis, as did [redacted] The record does not show that [redacted] supervisors were similarly situated to her.

[redacted] also alleges that her co-supervisor, Ted Porras, engaged in misconduct similar to hers and was not disciplined for that conduct. Again, we do not believe that the record demonstrates that Mr. Porras was similarly situated to [redacted] or, more importantly, that he engaged in misconduct similar to that of [redacted]

First, it must be noted that Porras was, essentially, a newly-minted supervisor. The record indicates that when he became a supervisor he was still basically under the supervision
(and thumb) of [Redacted]. Even though he might have obtained a supervisor’s title, the record reveals that [Redacted] was still calling the shots.

Also, the only two incidents where [Redacted] claims that Porras was treated more favorably than her do not demonstrate discrimination. The first incident refers to an SSR (Supervisor’s Situation Record) issued to [Redacted]. There is nothing in the record to indicate that an SSR is a form of discipline. Nor does the record reflect that [Redacted] was terminated because she received this SSR. Further, the portion of the transcripts cited by [Redacted] appears to us to show that her supervisors expected [Redacted] to be responsible for the project in question even though it might technically have been given to both Porras and [Redacted].

In the other example, [Redacted] complains that she was disciplined for allowing a flex schedule and PTO, but that Porras was not. We believe this misstates the record. It would appear that [Redacted] was disciplined for the way she administered the flex schedule and PTO (forcing people to work before they could take PTO; allowing some employees to take time while arbitrarily denying requests for others). We see nothing in the record demonstrating that Mr. Porras administered PTO or flex scheduling unfairly or improperly.

We also see nothing in the record indicating that Porras, as a supervisor, made his subordinates’ work life miserable or that he consistently failed to perform supervisory responsibilities. In short, we do not believe the record supports [Redacted] claim that Mr. Porras was similarly situated to her and that he received more favorable treatment after having engaged in similar misconduct.

Regardless of whether Mr. Porras or [Redacted] supervisors were similarly situated to her we believe the Hearing Officer was correct in concluding that [Redacted] failed to prove that she was a victim of gender discrimination. To prevail on her discrimination claim, at hearing, was required to prove that the Agency or decision-maker deciding her discharge was motivated by discriminatory animus. Randle v. City of Aurora, 69 F.3d 441, at 453, n. 18 (10th Cir. 1995). We see no evidence in the record tending to prove the decision-maker in this case, Mary Beth Klee, decided to terminate [Redacted] because of her gender.

III. Policy Setting Precedent

[Redacted] argues that the Hearing Officer’s decision should be overturned based on two issues which, she claims, sets poor policy precedent. Again, we do not see things as does [Redacted]

A. Investigator Training

The investigator looking into allegations of misconduct by [Redacted] (Becky Pizzulo), evidently, did not complete a training program developed by the CSA. This would appear to run afoul of CSR 15-104, which states:

The agency or Career Service Authority will immediately undertake effective, thorough, and objective steps concerning the allegation of harassment or discrimination. If an investigation is deemed necessary, it will be completed and a determination regarding alleged harassment will be made and communicated to the employee as soon as practicable. Agency staff conducting harassment or any other type of workplace investigation will be required to complete a training
program on investigation techniques as developed by the Career Service Authority Training Section.

Nevertheless we believe that CSA's failure to adhere to this Rule does not warrant a reversal of the Hearing Officer's decision.

First, it would appear that the real intended beneficiaries of this rule are the agencies needing an investigation and the individuals making allegations of discrimination. This rule, unequivocally, does not give [redacted] as an alleged harasser, a right to have an investigation conducted by the agency. We, therefore, do not see this rule as intending to protect an alleged harasser from discipline resulting from an investigation, regardless of how the investigation was performed or who it was performed by.

Second, we see no evidence in the record that the results of the investigation, or the facts determined by Ms. Pizzulo, would have been any different had she taken a class sponsored by CSA. [redacted] has shown us nothing in the record to indicate that had Ms. Pizzulo been "properly" schooled she would have asked different questions, asked questions in a different way, interviewed different people, or written a different report with different findings or conclusions. [redacted] speculation on these matters does not provide us with a reason to overturn the Hearing Officer.

In addition, we cannot help but be struck by the irony of [redacted] claim that Ms. Pizzulo was unqualified. We counted at least a dozen instances in the record where [redacted] herself, referenced her own military background and experience to explain or justify her own actions. Ms. Pizzulo, who [redacted] claims to be unqualified, however, had much more military experience than [redacted] and achieved a higher rank. Specifically, the investigator ended her military career with twenty-one years of service, having achieved the rank of Human Resources Major (Tr. Vol. II, p. 5:7-9). We do not understand how or why we should value [redacted] military background and experience while at the same time marginalizing or ignoring altogether the much more extensive military background and experience possessed by Ms. Pizzulo.

We also will not overturn the Hearing Officer's decision because the record plainly reflects that the Hearing Officer ruled the way she did not because of the investigation, but because of the testimony and documentation considered at the Hearing. [redacted] was given every opportunity to cross-examine the investigator (as well as the decision-maker who may have relied on portions of the investigation) and point out to the Hearing Officer all of the alleged shortcomings of the investigation. [redacted] was also given every opportunity to present evidence and witnesses to counter any portion of the investigation she believed to be faulty or deficient. In short, [redacted] has not demonstrated to us that she was in any way prejudiced by the fact that the investigator had not taken a class developed by the CSA concerning investigative techniques or that the outcome of the hearing would have been any different had the investigator been through the CSA class.

B. Hearing Officer Misconduct

Of course, we do not mean to imply that [redacted] as the subject of an investigation, was not entitled to a fair investigation. On the contrary, we believe she was entitled to a fair investigation, though it is plain from the language of CSR 15-104 that it is not this rule from which that right emanates. In any event, we believe the record demonstrates that the investigation conducted was, indeed, a fair investigation.

4 Transcript Vol. III, pages 45, 50, 54, 62, 71, 72, 77, 125, 150, 154, 156.
At page 21 of her brief, _______ essentially alleges that the Hearing Officer engaged in misconduct by acting as prosecutor when she found a violation of CSR 16-60J; and that this misconduct amounted to policy setting precedent. We do not believe that the record proves that the Hearing Officer impropriously assumed the role of prosecutor when she found the rule violation. Rather, it appears to us that she heard evidence, reviewed documents, and concluded (based on documents admitted into evidence and testimony adduced at hearing) that _______ had been given an order in the form of the language contained in her PIP and that she had violated the order at least on two occasions. We believe the Hearing Officer acted properly.

IV. Discipline

_______, starting at page 14 of her brief, claims that in upholding her discharge the Hearing Officer misinterpreted CSR 16-20. This rule states:

Section 16-20 Purpose of Discipline
The purpose of discipline is to correct inappropriate behavior or performance, if possible. The type and severity of discipline depends on the gravity of the offense. The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record. The appointing authority shall impose the type and amount of discipline he or she believes is needed to correct the situation and achieve the desired behavior or performance.

_______ however, points us towards nothing in the Hearing Officer's decision that could be considered a misinterpretation of this rule. The closest she comes to this is her argument found on page 17 of her brief where she states that termination is not in accord with the City's stated purpose of discipline. But the rule itself acknowledges that the implementation of progressive discipline might not always be possible. In addition, we note that CSR 16-50A1 states that progressive discipline will be administered only where "practicable" and 16-50A3 states, "[t]his rule should not be interpreted to mean that progressive discipline must be taken before an employee may be dismissed." Having independently reviewed the Hearing Officer's decision, we find no misinterpretation of Rule 16-20 or any other rule involving the imposition of discipline.

In reality, _______ argues that there was insufficient evidence to support the Hearing Officer's decision to uphold the termination. This is not the case. The record reflects, and the Hearing Officer so found, that _______ had received ample notice that her behavior and interactions with her subordinates were problematic. The record also reflects that _______ appeared to have an excuse for all of the noted shortcomings, only that she, herself, was never the issue. She consistently blamed the problems on her subordinates' inability to understand her, or their too-delicate sensibilities, or her military background, or the pressures of the job. The Hearing Officer noted that the Agency's decision-maker, Chief Klee, testified that _______ failed to internalize the criticisms of her demeanor and performance, and that _______ refused to take responsibility for the part her conduct played in the workplace dynamics. The Hearing Officer also took note of the personal damage _______ had wrought with her subordinates. Because the Hearing Officer's conclusions are supported by record evidence, and because we cannot say that the Agency's decision to terminate _______ was unreasonable or excessive under the circumstances, we will not disturb the Hearing Officer's decision to uphold the discharge of _______.
For all of these reasons, the Hearing Officer's decision is AFFIRMED.\(^5\)

The Hearing Officer's decision is hereby AFFIRMED, and this appeal is dismissed.

SO ORDERED by the Board on September 20, 2012, and documented this 20th day of December, 2012.

BY THE BOARD:

Chair (or Co-Chair)

Board Members Concurring:
Patti Kling
Amy Mueller
Derrick Fuller

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing FINDINGS AND ORDER on January 4, 2013, in the manner indicated below, to the following:

HR Services via email: HR.Services@denvergov.org
Career Service Hearing Office via email: CSAhearings@denvergov.org

\(^5\) In affirming this decision, because it was not the subject of a cross-appeal and not necessary for deciding this appeal, we take no position on the correctness of the Hearing Officer’s finding, or the rationale supporting the finding, that the Agency failed to prove a violation of CSR 16-60M.