HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 70-08

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

GLENN SCHULTZ, Appellant,

vs.

DENVER ZOOLOGICAL FOUNDATION, INC., and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on January 29, 2009 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and represented himself. The Agency was represented by Assistant City Attorney Robert Wolf, and Agency Director of Human Resources Leslye Bilyeu served as advisory witness. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order:

I. STATEMENT OF THE CASE

On Sept. 17, 2008, Appellant Glenn Schultz was suspended for one day from his position as a Maintenance Technician HVAC for the Denver Zoological Foundation, Inc., (Agency). Appellant filed this direct appeal challenging that suspension on Sept. 23, 2008. Agency Exhibits 1 – 7 were admitted by stipulation. No other exhibits were offered by either party.

II. ISSUES

The issues in this appeal are as follows:

1) Did the Agency establish by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules (CSR), and

2) Did the Agency establish that a one-day suspension was within the range of penalties that could be imposed upon Appellant by a reasonable administrator for the violations proven under the rules?

III. FINDINGS OF FACT

Appellant is employed as a Maintenance Technician HVAC for the Denver Zoological Foundation, Inc. (Agency). On Sept. 17, 2008, Appellant was served with a notice of suspension for one day based on the following allegations:

1. On July 22, 2008, Appellant told Field Supt. Karen Kielpikowski that she'd better stay away from a co-worker "because he doesn't like dogs."

2. On July 23, 2008, Appellant became angry and unprofessional with Maintenance Technician Ronnie Roybal and called him a "bald-headed ghetto Chicano" because he was sitting in a chair Appellant considered to be his own.

3. On August 7, 2008, Appellant told his supervisor Art Benton he was going to "kick [Mr. Roybal's] ass", and didn't "need low-life Chicanos talking to [him] like that."

4. On Aug. 8, 2008, Appellant became angry with Master Electrician James Rainguet when the latter complained about Appellant's use of a parking space. Appellant responded by telling Mr. Rainguet he was lazy, old, and a poor electrician who should retire.

The evidence revealed that on July 22, 2008, Appellant was walking with Maintenance Technician Russ Durando, and told him about his new puppy. Mr. Durando told Appellant he didn't like dogs. When they met Ms. Kielpikowski walking the other way, Appellant remarked, "Karen, stay away from this guy, he doesn't like dogs." Mr. Durando later told Appellant that Ms. Kielpikowski might take that comment the wrong way. Ms. Kielpikoweski's feelings were in fact hurt by the remark. At first, she told herself to consider the source. When it continued to bother her, she informed her supervisor, Carol Flohr, who encouraged her to report the remark to Ms. Bilyeu in the Human Resources Office. Ms. Kielpikowski followed her advice.

Appellant testified that he felt sad that his remark hurt Ms. Kielpikoweski's feelings, and would have apologized if he had realized how she had interpreted it. After Ms. Kielpikoweski's testimony, Appellant apologized to her.

As to the second allegation, the evidence showed that Appellant and Mr. Roybal were outside of the stone garage in the break area on July 23rd. After mentioning to Mr. Roybal that he had just seen his eye doctor, Appellant told Mr. Roybal to get out of his chair. When Mr. Roybal refused, Appellant reported him to their supervisor Art Benton. Appellant returned to the break area, put his face very close to Mr. Roybal's, and said, "[g]et out of my chair now." Mr. Roybal replied that he didn't care about the chair, and Appellant could have it as soon as his break was over in five minutes. Appellant went back to Mr. Benton to repeat his complaint. After the second report, Mr. Benton himself asked Mr. Roybal to take the chair back into the garage. Mr. Roybal did so. [Testimony of Messrs. Roybal and Benton.]

Appellant testified that he had repaired the broken dowels in an office chair he got from the city warehouse, and that the glue was still drying when he saw Mr. Roybal in the chair, rocking back and forth. Appellant was upset when Mr. Benton did not react to what Appellant considered Mr. Roybal's misuse of the chair. [Testimony of Appellant.]

Later that day, Mr. Roybal saw Appellant, who "snickered" at him. Mr. Roybal told Appellant he was a crybaby. Appellant responded by calling Mr. Roybal "a bald-headed ghetto Chicano." Mr. Roybal asked him to repeat what he said. When Appellant did, Mr. Roybal told him that he was going to report the remark to Mr. Benton. He never did so, but thereafter Mr. Roybal considered Appellant "invisible to me per se."

In support of the third incident, Mr. Benton testified that Appellant told him during a meeting in his office that he was going to "kick [Mr. Roybal's] ass", and didn't "need low-life Chicanos talking to [him] like that." Mr. Benton advised Appellant he should be careful how he talked because it could get him fired. Appellant denied he said he would "kick his ass", but admitted he "may have said some horrible things" because Mr. Roybal provoked him by "jumping all over me for weeks". "He would go by me and say, 'Ahh', 'Wooo' like Louis Prima." Appellant was also irritated by seeing Mr. Roybal's blood testers for treatment of his diabetes "all over the place."

Appellant testified that Mr. Benton let things escalate by not bringing the two of them into the office to discuss things. Mr. Benton stated he avoided doing that because, during past such meetings, Appellant has responded by calling other employees names. He added that he has counseled Appellant to avoid making negative comments about other employees, pointing out that Appellant complains when others talk about him. Mr. Benton testified that he spends a lot of time protecting Appellant from the complaints of supervisors, zookeepers and other employees.

The last incident occurred the morning of Aug. 8, 2008 in the zoo parking lot. The evidence showed that Mr. Rainguet was in a bad mood after a long commute when he observed that Appellant had parked his work cart in front of two parking spaces, making it difficult for Mr. Ranguet and others to pull into the blocked spaces. Mr. Rainguet called Appellant an "inconsiderate bastard," and asked him why he left his cart there. Appellant responded by telling Mr. Rainguet to shut up, and added that Mr. Ranguet was old and lazy, and should just retire, since he wasn't a very good electrician anyway. Shortly thereafter, they apologized to one another, shook hands, and resumed their previously friendly relationship. Mr. Rainguet declined his supervisor's offer to type a statement about the incident because "I felt it was unnecessary at the time." [Testimony of Appellant and Mr. Rainguet.]

Mr. Benton imposed the one-day suspension based on mitigating statements made by Appellant and his representative Ed Bagwell at the pre-disciplinary meeting on Sept. 3, 2008. At that meeting, Appellant agreed that he has "a difficult time getting along with others and controlling what comes out of [his] mouth." He did not recall

making the asserted derogatory comments to Mr. Roybal and Mr. Rainguet, but admitted he has used that type of language before. Appellant also stated he wished to enroll in sensitivity training and anger management classes. [Exh. 1-2.] Mr. Benton considered Appellant's past disciplinary record, which includes three verbal warnings, a written reprimand, and a five-day suspension over the previous four years. [Exhs. 1-2, 6.] Mr. Benton was first inclined to impose a three-day suspension for the proven misconduct. After considering Appellant's comments, indicating his intent to improve his self-control, he offered Appellant the opportunity to resolve the disciplinary matter by accepting a one-day suspension along with anger management and sensitivity classes. When Appellant ultimately rejected this offer, Mr. Benton imposed a one-day suspension.

IV. ANALYSIS

The City Charter requires that appeals from employment actions must be decided based on a de novo determination of the facts. D.R.M.C. § 18-3. The Agency bears the burden to prove that the imposition of discipline was appropriate under the Career Service Rules, and that the level imposed was within the range that could be issued by a reasonable administrator.

1. 16-60 0: Failure to maintain satisfactory work relationships

The Agency first asserts that the four incidents violated the Career Service Rule requiring all employees to maintain satisfactory relationships with fellow workers. In order to prove that violation, the Agency must establish "conduct that would cause a reasonable person standing in the employee's place to know that it would be harmful to another person or have a significant impact on his working relationship with that person." In re Williams, CSA 53-08, 5 (12/19/08), *citing* In re Burghardt, CSA 81-07, 2 (CSB 8/28/08).

Each of the four incidents was offered as proof that Appellant violated this rule. Ms. Kielpikowski reasonably interpreted Appellant's remark that she should stay away from another employee "because he doesn't like dogs" as a statement that she herself was a dog. Appellant denied he meant that, but never explained what he did mean, except that he was excited about his new puppy, and surprised that Mr. Durando did not like dogs. Mr. Durando, a disinterested witness to the remark, immediately observed that Ms. Kielpikowski "may take that wrong." Appellant admits that it was "a dumb thing to say", and would have apologized if he knew Ms. Kielpikowski was offended.

The next two incidents involved Appellant's interactions with Mr. Roybal. Both Mr. Roybal and Mr. Benton testified that Appellant referred to Mr. Roybal as "a bald-headed ghetto Chicano" and "a low-life Chicano" on two separate days. Appellant did not recall making those comments, but admitted he has said those kinds of things in the past. Appellant testified that he believes Mr. Roybal acted intentionally to annoy him, and that Mr. Benton should have taken some action against Mr. Roybal to stop the

behavior. Appellant testified that he thinks Mr. Benton "caters to" five employees who bully Appellant, one of whom is Mr. Roybal.

Appellant does not dispute the evidence of Mr. Ranguet regarding the final incident at the parking lot. Both Mr. Rainguet and Appellant admitted they were "inconsiderate", and later apologized to one another.

In all four incidents, Appellant spoke impulsively without regard to the feelings or reactions of others. Appellant admitted that he sometimes speaks in anger when under stress, although he did not recall exactly what he said during these events. The four witnesses to the incident testified credibly about the exact words used by Appellant, and about their negative reaction to them. Ms. Kielpikowski was hurt by what she reasonably believed was an insult. Mr. Roybal was angry about Appellant's unexpected demand that he get out of "his" chair, twice reporting him to his supervisor, and later calling him "a bald-headed Chicano." Mr. Benton advised Appellant not to repeat his threat to "kick his ass" and his insulting comment about Mr. Roybal's race, warning him that it may get him fired. Mr. Rainguet angrily confronted Appellant about blocking parking spaces, but Appellant escalated the matter by calling Mr. Rainguet old, lazy, and a bad electrician. While both later apologized, Appellant's reaction was a disproportionate and unprofessional personal attack on his fellow employee's age, work ethic and competence.

The proven demeaning comments about other employees' national origin, age, sex, work ethic and competence harmed the affected employees. In addition, Mr. Roybal decided to avoid any unnecessary future contact with Appellant as a result of Appellant comments. Appellant therefore caused a significant negative impact on his working relationship with Mr. Roybal. See In re Williams, CSA 53-08, 5 (12/19/08), *citing* In re Burghardt, CSA 81-07, 2 (CSB 8/28/08). The Agency established a violation of § 16-60 O based on the four incidents specified in the disciplinary letter.

2. 16-60 R: Discrimination or harassment of any employee

A violation of this rule is proven by statements made to co-workers that are derogatory of the employee's race, sex, age, national origin, or other basis protected by law. In re Burghardt, 81-07, 3 (CSB 8/28/08).

Appellant admits he made the remarks testified to by Ms. Kielpikowski and Mr. Durando, and also concedes he "may have said some horrible things" under stress or provocation. By insulting other employees on the basis of their national origin, age and sex, Appellant injected an element into the workplace that is barred by the personnel rules governing both conduct and discipline. § 15-102 A.; 16-60 R. "It is the policy of the Career Service Board that all employees have a right to work in an environment free of discrimination and unlawful harassment." § 15-101.

Appellant argues that his comments could have been avoided if Mr. Benton had taken action in the form of discipline against Mr. Roybal. Appellant did not specify any

previous misconduct by Mr. Roybal for which he should have been disciplined. The basis for Appellant's annoyance with Mr. Roybal appeared to be that he left his blood testers around, and that he would jump out at him and shout. Appellant did not testify that he asked Mr. Benton for intervention. In any event, past annoyances do not justify derogatory comments made about fellow employees' national origin, age and sex. Moreover, an employee's lack of control over his own anger is not a defense to a charge of making demeaning statements on the basis of another employee's protected status. The Agency proved that Appellant violated § 16-60 R by his derogatory comments about other employees' national origin, sex, and age on all four of the dates indicated in the disciplinary letter.

3. Appropriateness of Discipline

The purpose of discipline at the Department is to correct behavior, and render a penalty both consistent with other misconduct and appropriate to the circumstances.

In determining the appropriate penalty, Mr. Benton considered the seriousness and pattern of the misconduct, as well as Appellant's past disciplinary history. Mr. Benton also weighed Appellant's comments during the pre-disciplinary meeting, and determined that the discipline could be used to take advantage of Appellant's expressed desire to change by reducing the days of suspension to one day, and mandating anger management and sensitivity classes. After Appellant rejected those conditions, Mr. Benton nonetheless imposed the lesser suspension.

The Agency established that Appellant made intemperate and insulting comments to three different employees over the course of a mere fourteen work days. Contrary to Appellant's argument, the evidence reveals no provocation or other mitigating circumstances, including work stress. Under the circumstances, a one-day suspension was an attempt to give Appellant the opportunity to change the harmful tenor of his work behavior and relationships, and was considerably shorter than his previous five-day suspension in 2007. Under these circumstances, a one-day suspension was a reasonable, even minimal, penalty for the proven misconduct under the principles of progressive discipline. CSR §§ 16-20, 16-50.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency action dated Sept. 17, 2008 is AFFIRMED.

DATED this 2nd day of March, 2009.

Valerie McNaughton
Career Service Hearing Officer