

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

Appeal No. 17-05

DECISION

IN THE MATTER OF THE APPEAL OF:

JAMES H. SMITH

Appellant,

vs.

DENVER INTERNATIONAL AIRPORT

Agency, and the City and County of Denver, a municipal corporation.

The hearing in this appeal was held on May 23, 2005 before Hearings Officer Valerie McNaughton. Appellant was present throughout the hearing and represented himself. The Agency was represented by Assistant City Attorney Robert D. Nespor. Having considered the evidence and arguments of the parties, the Hearings Officer makes the following findings of fact, conclusions of law and enters the following order:

FINDINGS AND ANALYSIS

This is an appeal of a one-day suspension of Appellant James H. Smith, who was an Assistant Aviation Operations Manager (AAOM) in the Denver Department of Aviation (Agency) at the time of the discipline. The action dated February 11, 2005 was imposed based upon the allegation that Appellant made an offensive comment to a coworker on January 11, 2005. This timely appeal asserts that the suspension violates Career Service Rules (CSR) on progressive discipline and was taken in retaliation for Appellant's assistance to a city audit of compensatory time paid by the Agency. Appellant requests rescission of the suspension and its removal from his personnel file.

The Agency's Exhibits 1 – 13 and Appellant's Exhibits A – C were admitted without objection.

I. **NATURE OF DISCIPLINE**

Appellant was given a one-day suspension based upon the appointing authority's conclusion that he made a sexually offensive remark to a female coworker. The Agency charged Appellant with the following specific violations of the Career Service Rules

(CSR): sexual harassment, failure to maintain satisfactory work relationships with coworkers, and failure to observe departmental regulations.

II. ISSUES

The following issues were presented for decision:

1. whether the Agency proved that Appellant violated the Career Service Rules by a preponderance of the evidence;

2. whether the Agency's action was taken in retaliation for protected activity under CSR § 15-106, and

2. whether a one-day suspension was reasonably related to the seriousness of the offense in conformity with CSR § 16-10.

III. FINDINGS OF FACT

On the morning of January 11, 2005, Appellant was assigned to cover the B Control Tower at Denver International Airport to replace a sick employee. Fellow AAOMs Rick Graves, Carol Zahner and Jacqueline Yaft were also working the tower that morning.

Ms. Zahner and Appellant began early in the tower. By 7:45 A.M., full de-icing operations were ordered because of severe weather conditions. Mr. Graves and Ms. Yaft arrived to assist, and things were busy until almost 11 A.M. When the work slowed, the four had time to talk. The rotation schedule for the yearly shift assignments was due to be posted in a few months. Mr. Graves remarked to Ms. Zahner that he would probably have to choose a different line (duty schedule) again this year, in good-natured reference to the fact that Ms. Zahner had used her greater seniority to bump him last year. Ms. Yaft jokingly speculated about what shift she would get, and added, "oh yeah, it will probably be the same as the last five years since I am least in seniority and I always get the last shift line." Appellant then remarked, "If you keep your knee pads on, Eric might keep you in the staff position." [Exh. 13.]

In October 2004, Ms. Yaft had been selected to perform one of four staff assignments performed by AAOMs. That assignment was to develop the training program for plane gate scheduling. As scheduler, Appellant held another of the staff positions. Staff assignments are preferred because they work on weekdays and are exempt from the midnight shift.

Ms. Yaft testified that Appellant used a serious tone and looked her straight in the face when he made the knee pads remark, then put his jacket on and said, "I'm leaving. I've got things to do." Ms. Yaft reacted with surprise. She asked Mr. Graves and Ms. Zahner if they had heard what Appellant had said. Mr. Graves confirmed, "[y]eah, I heard it, and it was bad." Ms. Zahner had only heard the words "knee pads", and told

Ms. Yaft she thought Appellant was joking and didn't mean anything by it. Ms. Yaft told her Appellant was serious, and had looked straight in her eyes when he said it. Ms. Yaft started crying and told Ms. Zahner she was not that type of girl. [Exhs. 8, 11 – 13.]

Ms. Yaft then called her supervisor Ron Schlotthauer to report the incident. She was upset and still in tears during their meeting as she reported Appellant's remark. [Exh. 9.] While still with Mr. Schlotthauer, Ms. Yaft called Operations Manager Bob Classen, and all three met a few minutes later. Ms. Yaft informed them that over the past weeks Appellant told her that other employees thought Ms. Yaft's staff assignment showed she was getting special treatment. Mr. Classen said he did not believe employees held that opinion, but that he was aware Appellant was unhappy with Ms. Yaft's staff assignment because he thought he should have received it. [Exh. 10.] Bob Classen was Appellant's supervisor at the time of the incident. After meeting with Ms. Yaft and Mr. Schlotthauer, he determined that he was required to report the matter to his supervisor, Chief Operations Manager Eric Hall. Mr. Hall set a time for them to meet that afternoon.

Ms. Yaft next called Operations Manager Steven Edholm to relay Appellant's comment, and asked him to attend the meeting with Mr. Hall. [Exh. 8.] Mr. Edholm testified that Ms. Yaft was so emotional during their conversation that she was initially difficult to understand. Ms. Yaft told Mr. Edholm that she wanted an apology from Appellant in order to resolve the incident. Mr. Edholm testified that her coworkers, including Appellant, know that Ms. Yaft's strict Christian upbringing makes her different from others in the department.

That afternoon, Ms. Yaft met with Chief Aviation Operations Manager Eric Hall and Messrs. Schlotthauer, Classen and Edholm. Ms. Yaft emotionally repeated the exchange among the AAOMs and Appellant's remark to her. Mr. Hall directed Mr. Schlotthauer to get statements from the witnesses immediately, and ordered that no one was to communicate with Appellant about the incident until more was known about the facts and Human Resources was consulted. [Exh. 10.] Mr. Hall then consulted with Marinda Kincaid of Human Resources, and at her request delivered the witness statements to her.

After the witness interviews were complete, Human Resources Manager Jim Thomas met with Mr. Hall and Deputy Manager of Aviation/Operations Mark Lovin to review the statements. The three determined that Appellant should be placed on paid investigatory leave until the matter was resolved. Mr. Thomas drafted the January 14th notification that Appellant was being placed on investigatory leave, which instructed Appellant not to speak with Aviation Department employees other than Messrs. Lovin, Hall, or Thomas during the investigation. [Exh. 5.] That day, Mr. Thomas orally informed Appellant of the nature of the charge against him.

In Appellant's absence, Mr. Hall had the locks changed. The latter action surprised Mr. Schlotthauer, who thought perhaps the action had something to do with Appellant's involvement in an audit of compensatory time. Mr. Schlotthauer called

Human Resources Manager Jim Thomas, who shared that opinion. [Testimony of Mr. Schlotthauer.] At Appellant's request, Mr. Thomas recommended to the airport co-managers that Appellant be offered a transfer to the position of Systems Supervisor of Maintenance/Engineering. The transfer was arranged for Appellant's first day back with the agreement of Messrs. Hall and Lovin. [Testimony of Mr. Thomas.]

At the Feb. 1, 2005 pre-disciplinary meeting, Appellant and his representative Mark Bove, Esq. met with Messrs. Hall and Thomas. Appellant made an oral statement and submitted his written statement which conveyed his sincere apology to Ms. Yaft and the department. [Exh. 3.] Mr. Thomas believed that the comment was an isolated incident, and therefore recommended a written reprimand or short suspension, an apology to Ms. Yaft and additional training, which he determined would be consistent with other discipline imposed for similar incidents. [Testimony of Mr. Thomas.] Because airport co-managers Vicki Braunagel and Turner West were relatively new to their positions, Mr. Thomas discussed the situation with them. They decided a one-day suspension and training was appropriate under the circumstances. Messrs. Hall and Lovin considered Appellant's good work record and the absence of previous discipline in determining that a one-day suspension and additional training were appropriate penalties. [Exh. 2.] The Agency does not dispute Appellant's testimony that he received a rating of "exceeds expectations" for eight of his twelve years of city employment.

Appellant testified that he does not recall making the remark in question, but that if he did it was meant as a reference to an ongoing joke about the need to beg for favorable treatment while in the managers' offices, which developed because knee pads are equipment used at the airport. Six witnesses testified they had heard the remark made by others at different times. [Testimony of Mr. Graves, Ms. Zahner, Mr. Classen, Ms. George, and Messrs. Atencio and Harmes.] Three of those witnesses stated they considered the comment crude or inappropriate. [Testimony of Mr. Graves, Ms. Zahner and Ms. George.] Two employees indicated that the remark was most likely to be made among those who worked closely together. [Testimony of Ms. George, Mr. Harmes.]

IV. ANALYSIS

The Career Service Rules require a de novo hearing of disciplinary appeals. The Agency bears the burden to establish that discipline is proper by a preponderance of the evidence. CRS § 13-25-27.

1. Violation of Career Service Rules

- A. CSR § 16-50 A. 10) Discrimination or harassment of any employee or officer of the City and County of Denver because of race, color, religion, national origin, sex, age, political affiliation, sexual orientation or disability. This includes making derogatory statements about a protected class regardless of whether the comments are made directly to a member of the protected class.

The Agency contends that Appellant violated the above rule by his comment to Ms. Yaft suggesting that she wear knee pads into the supervisor's office when asking to keep her staff assignment. The Agency argues that Appellant thereby suggested Ms. Yaft would use sex to persuade the supervisor to grant her a career advantage.

Mr. Graves testified that Appellant said to Ms. Yaft, "[i]f you stay on your knees in OPS 3's office, you'll get staff again." [Exh. 11; testimony of Mr. Graves.] Ms. Zahner heard only the words "knee pads". [Exh. 12; testimony of Ms. Zahner.] Ms. Yaft recalled vividly that Appellant looked right at her and stated in a serious manner, "If you keep your knee pads on, Eric [Mr. Hall] may keep you in your staff position." Appellant testified he did not recall making the statement, but admitted on cross-examination that it connotes either the performance of a sexual act or "kissing the boss' butt," and that as such it would have been inappropriate. Appellant stated he was not aware until the date of the hearing that Ms. Yaft had never heard others make the same comment.

Although Appellant could not remember making this remark, he explained its probable context by relating that Ms. Yaft had previously asked his advice in keeping her staff position. Appellant said he had given her some tips, and that the two had a friendly relationship based on their mutual interest in Florida. On the other hand, Mr. Classen testified he heard Appellant express resentment that Ms. Yaft held a coveted staff position that Appellant himself wanted. Ms. Yaft was adamant that the remark was delivered to her in a serious manner. Appellant admitted at hearing that he was under the stress of the de-icing operation that morning. I find that Appellant told Ms. Yaft in a serious manner, "[i]f you keep your knee pads on, Eric may keep you in your staff position." I also find that the remark was considered inappropriate in Appellant's workplace.

"Discrimination or harassment . . . includes making derogatory statements about a protected class." In the context of this rule, a single sexually inappropriate comment does not support a finding of discrimination or harassment unless it is so extreme that it alters the conditions of the victim's employment and thus creates a hostile or abusive work environment. In re Tafoya, CSA 72-04 (11/2/04); see also Faragher v. City of Boca Raton, 524 U.S. 775 (1998). Whether an isolated remark creates a hostile work environment depends on both objective and subjective factors. It must be both "severe . . . enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive", and also subjectively perceived by the victim as abusive. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

Here, the testimony indicates that Ms. Yaft felt insulted by the remark, and that she was emotionally upset by it for three days. Ms. Zahner laughed off the same remark when it was made to her, and Ms. George anticipated she would do the same. Mr. Edholm testified that Ms. Yaft was known by her coworkers to hold strict moral views based upon her religious upbringing. It is concluded that the remark was in common currency in this workplace, and was not so outrageous that it created an objectively hostile work environment.

B. CSR § 16-51 A. 4) Failure to maintain satisfactory working relationships with coworkers, other City and County employees, or the public

The Agency may prove a violation of this subsection if it establishes that Appellant's actions caused an unsatisfactory working relationship with a coworker, other city employees or the public.

Ms. Yaft testified that she reacted to the remark with tears, and believed Appellant was thereby accusing her of using sex to keep her current assignment. Ms. Yaft initially told Mr. Edholm she wanted an apology from Appellant in order to end this situation. Her emotional reaction lasted three days. Ms. Yaft also became emotional on the stand when recounting the incident, but appeared to accept Appellant's apology when he tendered it during his cross-examination of the witness. In his turn, Appellant testified that he asked for permission to apologize to Ms. Yaft at an early stage, but that he was instructed not to speak with anyone but the managers while he remained on investigatory leave. Upon his return to work, he was reassigned to another section at his own request based on Appellant's conclusion that he could not go back to Operations.

It appears that Appellant and Ms. Yaft at one time had a friendly working relationship in which they discussed both work and non-work issues. A few weeks before the event in question, Appellant indicated to Ms. Yaft that he thought others resented her staff position. [Exh. 10.] At the same time, Mr. Classen heard Appellant express his own unhappiness with what he considered special treatment given to Ms. Yaft. Appellant testified that the remark if made was intended as the kind of humor he and coworkers used to relieve a stressful job. This contradicts Appellant's later testimony that the remark must have been a product of the stress of the de-icing operation. I find Ms. Yaft reasonably perceived the insult embedded in the remark. Her reaction to it was emotional but not unreasonable given Appellant's previous expressions of resentment toward her staff assignment. During the investigation, Appellant decided he would be unable to continue to work at Operations, and so he asked Mr. Thomas to arrange for his transfer. At hearing, Appellant admitted that the remark was inappropriate, and that he was not making excuses for it.

I find that Appellant knew Ms. Yaft well enough to be aware of what others knew of her: that she held strict moral views and was likely to be unusually sensitive about perceptions of her morality. In spite of that fact, Appellant delivered a remark with an insulting moral implication. Appellant's request for a transfer acknowledged that his working relationship at Operations had become unsatisfactory. It is clear that Appellant has failed to maintain satisfactory working relationships with his coworkers, in violation of CSR § 16-51 A. 4).

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

For the same reasons as outlined in section IV a. A. above, I find that the Agency has not proven that Appellant's remark constituted sexual harassment.

D. CSR §§ 16-50 A. 20) and 16-51 A. 11) Conduct not specifically identified herein may also be cause for dismissal or progressive discipline

The above rules provide that discipline may be imposed even if the misconduct is not specifically defined in any subsection of CSR §§ 16-50 or 16-51. As I have found that discipline is appropriate under a specific disciplinary rule, it is unnecessary to reach a determination under the above rules.

2. Claim of Retaliation

Appellant contends that the discipline was imposed in retaliation for his assistance with the auditor's investigation into the Agency's payment of compensatory time claims, in violation of CSR § 15-106.

As part of his job as scheduler, Appellant maintained the department's records of staff compensatory time. In August 2003, at the city auditor's request, Appellant turned over certain airport pay records to the auditor. A few months later, the auditor initiated an audit of airport compensatory time. The audit became a sensitive issue at the airport in late 2003 because of telephone inquiries from investigative reporter Paula Woodward and an announcement by District Attorney Bill Ritter of possible criminal charges for abuse of compensatory time. Appellant testified that Mr. Hall directed him to withhold certain documents from those requested by the auditor, but that Appellant ultimately provided the documents to the auditor on the instruction of airport co-manager Braunagel.

In October 2003, at Ms. Braunagel's suggestion, Appellant began to note and report to Mr. Thomas events he believed threatened his job. Appellant reported to Mr. Thomas eight conversations with Messrs. Hall and Lovin that he considered threats. The last occurred on February 23, 2004. [Exh. C.] Appellant testified that the February incident occurred when Mr. Hall told him he was being returned to his rotation with the other AAOMs. After Appellant reported this conversation to Mr. Thomas, the decision was reversed by the co-managers. Appellant continued in his staff assignment as scheduler until his request for a transfer was granted in February 2005. [Testimony of Mr. Thomas.]

"Retaliation against employees for . . . assisting the City in the investigation of any complaint is against the law and will not be permitted." CSR § 15-106. The rule evidences the Career Service Authority's interest in maintaining an efficient city by providing protection from reprisal to employees who aid city investigations. When a city audit is an investigation into a complaint about the expenditure of public funds, employees who assist the audit by providing information are protected from retaliation by the rule. By analogy to statutes protecting federal employees, an employee proves a violation of this rule by showing that (1) he assisted the city in an investigation of a complaint, (2) the employer had knowledge of the employee's assistance in the investigation, (3) the employer took adverse action against the employee, and (4) the adverse action was motivated by the employee's assistance in the investigation. See 5 U.S.C. 2302(b)(8); 29 C.F.R. § 1613.261; and Grant v. Bethlehem Steel Corp., 622 F.2d 43, 46 (1st Cir. 1980), *citing* McDonnell Douglas v. Green, 411 U.S. 792, 802-04 (1973).

Here, Appellant has proven the first three elements of the claim. However, there is no evidence that the one-day suspension was motivated by a desire to retaliate against Appellant for his cooperation with the city audit. The appropriateness of the discipline was confirmed by the very co-managers who had successfully protected Appellant from a change in assignment in February 2004. Appellant provides no explanation for the lengthy delay between his protected activity and the asserted adverse action. At the time of this discipline, Appellant had reported no threat to his job for almost a year. [Exh. C.] The misconduct leading to the discipline was witnessed by two coworkers who testified credibly and who bore no discernible relationship to the audit. The evidence indicated that it was Ms. Yaft who was the driving force in this discipline, not the managers Appellant feared would retaliate against him. Human Resources Manager Jim Thomas, who supported Appellant during the audit process, testified that he believed both the discipline and degree of punishment were appropriate and consistent with past discipline for similar offenses. The degree of discipline does not evidence a disproportionate response to the misconduct, and thus does not indicate that it was the product of a retaliatory motive.

Based on the totality of the evidence, I find that Appellant has failed to prove that the Agency violated CSR § 15-106 by its imposition of the discipline.

3. Penalty

Appellant claims that the penalty of a one-day suspension was too harsh considering his lack of any previous discipline during his twelve years with the Agency, and when compared to the discipline meted out on others for similar offenses. He relies upon the principle of progressive discipline in CSR § 16-20 to argue that the Agency should have imposed a verbal or written reprimand.

The Agency claims the suspension was appropriate given the nature of the remark made to Ms. Yaft and its adverse effect on her. Ms. Yaft was deeply affected for three days by what she viewed as Appellant's personal attack on her morals. The Career Service Rules allow an appointing authority to impose the level of discipline appropriate to the situation, including the seriousness of the offense, the employee's past record, and that level of punishment necessary to achieve the desired behavior. CSR §§ 16-10, 16-20. The parties agree that the conduct has not recurred, and that the discipline has had the effect of impressing upon Appellant the seriousness of the misconduct, as indicated by his sincere apology.

Appellant points out that, in contrast to his suspension, the Agency gave a verbal warning to AAOM John P. Harmes for swearing in the workplace. Ms. Yaft testified that she recently overheard Mr. Harmes angrily use the word "fuck" while expressing his irritation with a United Airlines controller, and that she asked Mr. Schlotthauer to tell Mr. Harmes to tone it down. Mr. Harmes admitted at hearing to the use of salty language because he was in the navy. Mr. Schlotthauer testified that he gave Mr. Harmes a verbal reprimand rather than something more serious because it was not directed at anyone and was not threatening in nature. I find that the difference in penalty is based

upon a reasonable assessment of the seriousness of the offenses in question, in keeping with Rule 16. Under these circumstances, the Agency has established that the penalty was reasonably related to the seriousness of the offense in accordance with Career Service Rules.

Appellant also claims he was treated differently during the investigation than Mr. Harmes, who was allowed to immediately apologize to those offended. Given that Appellant was being investigated for a direct insult to Ms. Yaft, the Agency reasonably relied on the advice of the Manager of Human Resources in ordering Appellant not to contact Ms. Yaft during the investigation. Thereafter, Appellant was not prohibited from apologizing to Ms. Yaft, despite his transfer. Mr. Hall's decision to change the locks in Appellant's absence did not affect Appellant's ability to participate in the predisciplinary process. CSR § 16-30.

ORDER

Based on the foregoing findings of fact and conclusions of law, the one-day suspension issued on February 11, 2005 is hereby AFFIRMED.

Dated this 7th day of July, 2005.


Valerie McNaughton
Hearings Officer for the
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **ORDER** by depositing same in the U.S. mail, postage prepaid, this 7th day of July, 2005, addressed to:

James H. Smith
9071 E. Mississippi Ave., Apt. #25B
Denver, CO 80247

I further certify that I have forwarded a true and correct copy of the foregoing **ORDER** by depositing same in interoffice mail this 7th day of July, 2005, addressed to:

Robert D. Nespor
Assistant City Attorney
Litigation Section

Jim Thomas
Department of Aviation

