

DECISION

IN THE MATTER OF THE APPEAL OF:

DERRECK STUBBS, Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Derrick Stubbs, appeals a temporary reduction in his pay, assessed under Career Service Rule 16-74. The reduction in pay was assessed by his employer, the Denver Department of Aviation, (Agency), as discipline for his alleged violation of specified Career Service Rules and Agency regulations. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on November 8, 2011. The Agency was represented by Jennifer Jacobson, Assistant City Attorney. The Appellant represented himself. Agency exhibits 1-15 were admitted. The Appellant offered some of the same exhibits, and those exhibits were consolidated into those of the Agency. The following witnesses testified for the Agency: Genaro Abeyta; the Appellant; and Ron Morin. The Appellant testified during his case-in-chief, and offered no other witness. For reasons which follow, below, the Agency's decision to assess a temporary reduction in pay is AFFIRMED.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Appellant violated any of the following Career Service Rules: 16-60-A; J; K; L; or O.
- B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to assess a temporary reduction in pay conformed to the purposes of discipline under CSR 16-10.

III. FINDINGS

The appellant, Derrick Stubbs, works at Denver International Airport in the painting division. His duties include painting runways, as well as the exterior and interior of buildings. Safety training is of paramount importance, due to the paint

department's access to the air traffic side of the airport. Because of those inherent safety risks, safety training is mandatory.

On June 30, 2011, the painters were scheduled to paint runways. Because it had rained and the weather outlook was not positive, Stubbs' supervisor, Genaro Abeyta, told all team members to complete the just-installed July web-based training, so as to use their down time beneficially. Later, Abeyta returned from other duties and asked Stubbs if he had completed the training. Stubbs replied "I'm not feeling it." Abeyta did not pursue the matter at that time, and left to attend to other duties. Later, Abeyta called Stubbs on the radio, and asked Stubbs again if he completed the online training. Stubbs replied "It isn't even July yet," in reference to the training having been originally scheduled for July. At that point, Abeyta told Stubbs he was not asking, but ordering him to complete the training. When Abeyta returned to the paint shop, Stubbs threw his work keys at Abeyta, said he wasn't feeling well, and was going home. Stubbs had given no prior indication to anyone that he didn't feel well.

Stubbs filed a grievance against Abeyta for the way Abeyta ordered him to take the online training after Stubbs refused twice. Stubbs grievance stated, in pertinent part:

I told him [Abeyta] that I didn't feel like taking them [online training] at this time and that we had thirty day to get it done...About 40 minutes later... he says 'I want you to come into the shop and take the safety training.' I responded that it was not even July yet and then he blasted me over the radio [stating] 'I'm not asking you. I'm telling you.' To me this was not an appropriate and an unbecoming action of a supervisor.

[Exhibit 12; Abeyta testimony].

The Agency convened a pre-disciplinary meeting on August 12, 2011. Stubbs attended without representation. During that meeting, Stubbs essentially acknowledged Abeyta gave him several directives to complete training, and the directive was an effective use of the paint crew down time.

I was not approached about taking the training until we were in the South shop. I told Mr. Abeyta that I did not feel like taking the training at that time. I told him we had 30 days to take that training... The next time I heard from Mr. Abeyta, he called me on the radio, and gave me a directive. I disagreed with the tone, the wording and the means by which the directive was delivered... The next time I was approached by Mr. Abeyta was... when he called me on the radio and said with the directive, and when he gave me the directive, all I replied to him was that it's not even July yet, and he wants us, is forcing us to take... I just said it's not even July, and so that's when he gave me the directive... so at that time I didn't say anything to him...I tossed him the keys and I told him I was going home sick... We have 30 days to take this [test]. I don't know why he made such an issue of taking it that night, except for the fact that it raining, and we were waiting for the weather to break....

[Exhibit 12].

On August 25, 2011, the Agency notified Stubbs it was reducing his pay 4.55% for six months (13 pay periods), pursuant to CSR 16-74. Stubbs filed a timely appeal on September 8, 2011.

IV. ANALYSIS

A. CSR 16-60 A. Neglect of Duty.

The Agency failed to establish what duty Stubbs failed to meet. It appears this violation was linked to Stubbs failure to follow his supervisor's direct order, under CSR 16-60 J. Since the proofs for each are different, a violation for one does not automatically establish a violation of the other.

B. CSR 16-60 J. Failing to comply with the lawful orders of an authorized supervisor or failing to do assigned work which the employee is capable of performing.

This alleged violation was the essence of this appeal. Even if Stubbs believed Abeyta's original request was not a lawful order, there can be no question that Abeyta's subsequent direct command to Stubbs was an order as contemplated under this rule. Abeyta's order was premised on his desire to use his employees' time efficiently. [Abeyta testimony]. Training is mandated and necessary for the safe operation of the Agency. [Id]. Consequently, Abeyta's order was reasonable and lawful, both required elements of this rule. No matter how Stubbs couched his response, the end result was he failed to comply with Abeyta's order.

Stubbs failed to establish that he was too ill to comply with Abeyta's order. Stubbs admitted he said nothing to anyone that night about being sick before he threw his keys at Abeyta. His belated assertion, that his words "I'm not feeling it" meant he didn't feel well, is not credible. First, the meaning of those words is plainly antagonistic, and does not convey illness. Second, Stubbs claimed he felt well-enough to have performed his normal, strenuous painting duties, yet not well enough to sit in front of a computer to take online training. This, claim, too, is inherently not credible. Third, Stubbs response was consistent with a pattern of sarcastic responses to directives in previous disciplinary cases. [See discussion of past discipline, *below*]. These factors establish that Stubbs received a lawful order by an authorized supervisor and failed to comply with that order, in violation of CSR 16-60 J.

C. CSR 16-60 K. Failing to meet established standards of performance including either qualitative or quantitative standards.

The Agency's claim here was that Stubbs failed to meet the City-wide STARS (Service Teamwork, Accountability, Respect and Safety) values. [Exhibit 1-1]. As I have stated repeatedly, these values are not enforceable as Career Service Rule violations.

The Agency also claimed Stubbs failed to meet his work duty (PEP) standard "Employee reads, understands, and follow [sic.] rules, procedures, and regulations as

outlined in the Maintenance Policies and Procedures Manual 99% of the time." [Exhibit 1-1]. No evidence was presented concerning the percentage of time Stubbs met or failed to meet those standards, thus no violation is established.

D. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules.

**Maintenance Division – Policy and Procedure Manual
Interpersonal Relationships**

...Rudeness or harassment will not be tolerated.

...The Airport has established a no tolerance policy regarding harassment, arguing, failure to comply, and rudeness towards all security personnel.

[Exhibit 1-1, 1-2].

Stubbs rudeness to his immediate supervisor was apparent by his sarcastic responses to being ordered to comply with a lawful order. Stubbs explanations were unpersuasive for reasons already stated. The Agency, thus, established that Stubbs was rude in violation of CSR 16-60 L. The Agency failed to establish Stubbs harassed, argued, failed to comply with, or was rude to any security personnel.

E. CSR 16-60 O. Failure to maintain satisfactory working relationships with co-workers, other City employees, or the public.

The Agency failed to elicit evidence that Abeyta, or any other co-worker, would be less able to work satisfactorily with Stubbs as a result of his actions. This violation remains unproven. In sum, while the Agency failed to prove several of its claims, it proved the most egregious violation.

V. DEGREE OF DISCIPLINE

The Agency's determination of the appropriate degree of discipline must not be disturbed, in the absence of clear evidence that the chosen degree of discipline was clearly excessive, or based substantially on considerations which were not supported by the preponderance of the evidence. City and County of Denver v. Weeks, No. 10CA1408, 11 (Colo. App. Oct. 13, 2011)(*add'l citation omitted*). To that end, the Career Service Rules require a review of the severity of the proven offenses, past disciplinary history, and the likelihood that the chosen degree of discipline will likely result in correcting the offending behavior or performance. CSR 16-20.

A. Severity of the proven offenses.

Stubbs refusal to comply with Abeyta's order, to take required training and to use his time effectively, was a direct affront to the authority of a supervisor. Stubbs' determination that he, alone, would decide when to comply, demonstrates a

concerning lack of discipline in a potentially dangerous occupation that requires adherence to command and rule.

B. Past discipline

Stubbs has continued to demonstrate disdain for authority. In December 2010 he was suspended for 20 hours (2 working days) for violations including the failure to comply with a lawful order. In that case, Stubbs was seen viewing weapons websites at work. Abeyta required him to desist by written warning. [Exhibit 6]. Stubbs then viewed 380 weapons websites over the course of the next two months. [Exhibit 5-4 through 5-12].

In 2007 Stubbs was advised three times by a supervisor, Ray Moreno, that punching in or out from his shift more than seven minutes early or late could cause unauthorized overtime which was unacceptable. After the warning, Stubbs punched in early or late by more than 7 minutes five times between June and November, resulting in a written reprimand. Even more troubling than the fact of disobedience, was Stubbs' aggressive response to neutral information.

During this meeting you were presented with your KRONOS records, and were asked for an explanation for punching out late the prior day. You answered 'Nature called and you forgot about the time.' Mr. Moreno reminded you about your past incidents. You said 'Just process the slip, homes.'" Mr. Moreno replied it doesn't work that way and that all time must be accounted for and we talked about this before. You said "if I have to go, I'm not going to watch the clock, homes." Mr. Moreno shared that you could always punch out at 4:23 p.m. if you think you will go over the seven minutes. He also advised you that if this happens again that you would be given a letter. You replied 'Whatever, homes, do whatever you have to.'

[Exhibit 7-3].

Five days after that meeting, Stubbs punched in more than seven minutes early. During a subsequent meeting with two supervisors regarding lunch breaks, the following exchange ensued.

On October 29, 2007, Mr. Moreno and you came into Jeff Bartleson's office to discuss the allowed time for lunch breaks. They both explained my [Ron Morin, Director of DIA Field Maintenance] policy that allows reasonable time for travel and clean up prior to the beginning of your lunch time. At some point of the conversation Ray [Moreno] told you that he does allow ample time and technically he could allow less time but he gives enough time to travel and warm lunches up. You replied 'Yea, if you want to be an A-hole about it or act like a Genghis Khan then you should be forced to follow the same guidelines as field.'

[Exhibit 7-3].

In 2006, Stubbs received a written reprimand for several incidents of disobedience to supervisors Vallejos and Moreno. [Exhibit 9]. In 2005 Stubbs was given a verbal reprimand for persistently arguing against carrying a radio, even though it was a safety requirement. [Exhibit 10]. Stubbs' history of insubordination includes incidents with at least four different supervisors, making it exceedingly unlikely supervisor prejudice is always the cause of Stubbs' discipline.

In 2007, Stubbs was placed on a Performance Improvement Plan to improve his interpersonal relationships, including the requirements to avoid rudeness, offensive speech, criticism of supervisors, and to avoid offensive and abusive language. [Exhibit 11-1].

C. Penalty most likely to compel compliance.

The progression of discipline has, so far, not modified Stubbs' dismissive and sarcastic regard for authority. The current penalty appears to be the last stop in that progression, before dismissal. It is up to Mr. Stubbs to change his behavior or risk likely termination of his employment from the City without the possibility of re-applying for any City position for five years. CSR 16-75 C.

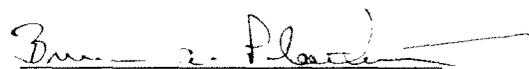
As regards Stubbs' grievance for Abeyta's tone in ordering him to complete online training, Abeyta had already ordered Stubbs twice to complete training and twice Stubbs replied with flip responses. Stubbs admitted he said nothing to anyone that night about being sick before he threw his keys at Abeyta. He claimed he felt well-enough to have performed his normal, strenuous painting duties, yet not well enough to sit in front of a computer to take online training. If anything, Abeyta's order was restrained in view of having just received two insulting replies to his two orders. The only insulting and unbecoming conduct at that time was by Stubbs, for his sarcastic replies to legitimate orders. In short, there was no basis for Stubbs' claim against Abeyta, and therefore no mitigation of his violations.

The Agency fairly weighed the factors, above, in arriving at an appropriate discipline. its decision, therefore, was not clearly excessive, nor was it based substantially upon considerations unsupported by a preponderance of the evidence.

VI. ORDER

The Agency's decision to assess a temporary reduction in pay against the Appellant, for thirteen pay periods, beginning August 29, 2011, is AFFIRMED.

DONE December 21, 2011.



Bruce A. Plotkin
Career Service Board Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board to review this DECISION, in accordance with the requirements of CSR 19-60 through 19-80, within fifteen calendar days after the date this order is delivered as stated in the attached certificate of delivery. **Please note the 15-day deadline begins from the date sent from the Hearings Office, not the date you receive it.** The Career Service Rules are available as a hyperlink at <http://www.denvergov.org/jobs/PublicNoticesandAnnouncements/CareerServiceAuthorityRuleRevisions/tabid/433593/Default.aspx>

All petitions for review must be filed with the:

Career Service Board
c/o CSA Personnel Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
EMAIL: Leon.Duran@denvergov.org

AND

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND

Opposing parties or their representatives, if any.