DECISION AFFIRMING FOUR-DAY SUSPENSION

IN THE MATTER OF THE APPEAL OF:

JACOB WERTHER, Appellant,

vs.

CLERK AND RECORDERS OFFICE, and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

The Appellant, Jacob Werther, appeals his four-day suspension, assessed by his employer, the Denver Clerk and Recorder's Office, on February 15, 2013, for alleged violations of specified Career Service Rules. A hearing concerning this appeal was conducted on June 4, 2013, by Bruce A. Plotkin, Hearing Officer. John Sauer, Assistant City Attorney, represented the Agency. Andrea Goldstein, Esq. represented the Appellant. Agency exhibits 1-7, 9 and 10 were admitted into evidence, as were Appellant's exhibits A-E, H, and J. The following witnesses testified for the Agency: the Appellant; Richard Dewar; Cambria Serrano; Juan Guzman; Debra Johnson; Denis Berckefeldt; and Dawn Sulley. The Appellant also testified during his own case, and called witnesses Marie Valencia and Brigitte Svalberg. For reasons stated below, the Agency's four-day suspension of the Appellant's employment is affirmed.

II. FINDINGS

Werther is an Administrative Support Assistant IV in the Denver Clerk and Recorder's Office (Agency). He began working there in 1993 and had no previous discipline.

On the morning of January 17, 2013, Werther fielded a call from a customer who was concerned a quit claim deed she submitted had not been recorded. Werther did not find the deed. He told the caller he would look into it and asked her to call back the following day. When the customer called back on January 18, Werther "cold-transferred" the call to his immediate supervisor, Richard Dewar. Dewar, surprised by having an upset customer's call transferred without any background information, asked the customer to hold.

Dewar asked the recording counter staff, including Werther, if anyone had any unrecorded documents on their desk. Werther volunteered he had several documents yet to be recorded. Dewar rummaged through the papers on Werther's desk and found the unrecorded quit claim deed. Dewar asked Werther sternly why he told the customer he couldn't locate the document, and told Werther to record it, which Werther did at 10:11 a.m. Meanwhile, Dewar returned to his office and to his phone call with the upset customer.

While Dewar was still on the phone with the customer, Werther entered Dewar's office, slammed the door and began shouting at Dewar. Deputy Director Juan Guzman was in a meeting in his office next door when he heard the loud bang of Dewar's office door and heard shouting in Dewar's office. He interrupted his meeting and went next door where he
saw Werther, standing and yelling at the seated Dewar. Guzman observed Dewar speaking in a normal voice, asking Werther to leave. Guzman ordered Werther to cease all discussion and leave. As Werther left Dewar’s office, he passed by co-worker Cambria Serrano who was servicing customers. Werther snipped “don’t tell me you don’t leave documents in your drawer.” [Werther testimony].

About 15 minutes later, Werther approached Guzman to complain that documents were not being recorded timely as required by state statute. Guzman, who had not heard that timely recording was an issue previously, replied he would investigate the allegation and asked Werther to give him time to investigate. Nevertheless, at 11:41 a.m., Werther sent an email to Dawn Sully, Executive Manager of the City Auditor’s Office to complain about the recording issue he shared with Guzman less than one hour before.

The Agency convened a pre-disciplinary meeting on February 5, 2013, attended by Werther and his representative. On February 15, 2013, the Agency suspended Werther for four days. This appeal followed timely.

III. **ALLEGED CAREER SERVICE RULE VIOLATIONS**

A. 16-0 B. Carelessness

A violation under this rule occurs for performing a duty poorly. In re Gomez, CSA 02-12, 3 (5/14/12), citing In re Simpleman, CSA 31-06, 4-5 (10/20/06).

1. Customer service. The Agency alleged Werther violated this rule for poor customer service. According to the Agency, Werther should have provided a satisfactory answer to the customer because he should have found the quit claim deed, and he should have called the customer instead of having the customer call back. [Johnson testimony; Agency closing statement]. Werther replied the quit claim deed was placed on his desk after he transferred the customer’s call to Dewar so that he was not responsible for the oversight. The Agency’s review of video revealed no document was placed on Werther’s desk during the time in question and Werther did not rebut the assertion] [Exhibit 2-5].

The issue remains what duty Werther performed carelessly. The Agency cited a general obligation to provide good customer service, but such an amorphous measure is ripe for abusively subjective interpretation. While the Agency may prefer its employees to take the initiative to make a return call instead of asking a customer to call back, there was no evidence the Agency provided notice of such preference, other than supervisors testifying at hearing that it would be a preferable practice. [Guzman testimony; Johnson testimony (“Our expectation is that customers are served on the first call”). With respect to when the quit claim deed was placed on Werther’s desk, the evidence was inconclusive. Therefore Werther cannot be faulted for failing to find it sooner.

2. Timely filing. The Agency also alleged Werther was careless in failing to file the quit claim deed timely. Even assuming the quit claim deed sat on Werther’s desk for a known time, the evidence at hearing revealed the Agency does not date-stamp or otherwise keep track of the date it receives documents to be recorded. [Guzman cross-exam]. That revelation was surprising for an institution directed by law to record documents within one day of receipt. [See note 5 for a more precise statement of filing deadlines]. Equally surprising, the Agency was unaware of, and does not enforce, the state-mandated filing requirement for timely filing. [Johnson testimony; Guzman testimony]. An agency may not discipline an employee for performing a duty carelessly when the agency does not uniformly enforce it.
B. 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 rule houses two separate violations: the violation of a direct order from a supervisor, and the failure to perform assigned work. Johnson testified Werther violated this rule for inappropriately escalating a customer's complaint to his supervisor via a "cold transfer." [Johnson testimony; Agency writing closing statement]. Johnson stated it would have been preferable for Werther to speak with Dewar before transferring the call. Even if Johnson's statement is true, it is unrelated to either portion of this rule. There was no evidence Werther received a direct order to escalate calls in a particular fashion; nor did the Agency establish that it provided notice of a protocol for escalation of customer complaints. The Agency also alleged Werther's cold transfer was "aggravating" to Dewar and to the customer. [Agency closing statement]. Even if true, that claim also fails to establish a violation under this rule. Finally, even accepting the Agency's statement that one of Werther's main duties is customer service, that duty is neither a lawful order, nor assigned work, under this rule. No violation is established under CSR 16-0 J.

C. 16-60 K. Failing to meet established standards of performance...

The following language, cited by the Agency, derives from Werther's written work duties.

When interacting with customers always portray a courteous, prompt and professional image.

Display high level of effort and commitment to exemplary service in satisfying every customer's expectation both internally and externally.

The Agency alleged Werther's direct and indirect interactions with customers, both the quit-claim deed customer and those overhearing his outburst to Dewar and snide remark to Serrano, violated this rule. In addition to the interpretive issues created by a lack of parallel structure in the first standard, ("...portray a... prompt... image.") this department standard is unenforceably vague as a disciplinary rule.1 In addition, other, more specific rules, such as CSR 16-60 M., O., and Y. (via Executive Order 112), address the conduct at issue. Consequently, I find no violation under this rule.

D. 16-60 L. Failure to observe written departmental or agency regulations, policies, or rules. When citing this subsection, a department or agency must describe the specific standard(s) the employee has failed to meet.

Employee Handbook /Customer Service / Superior customer service must be provided at all times.

This handbook standard is also unenforceably vague as a disciplinary rule. Johnson stated Werther failed to abide by the above customer service policy when he failed to resolve a customer's issue during her first call, and for making "intimidating" remarks. While Werther's aggressive behavior violated other rules, the handbook standard cited above provides insufficient notice what level of behavior is intolerable. What if an employee provides "really good" service, but not "superior" service? Is he subject to discipline? What defines "superior" service? The Agency also alleged Werther's "cold transfer" of a call from

1 Certainly, an agency may require its employees to meet general standards of conduct and dress. [See e.g. Denver Sheriff's Dept. RR 800. http://www.denvergov.org/Portals/744/documents/handbooks/DPD_Handbook_Final_6-4-2009_with_appendix.pdf at Appendix G]. Moreover, the above-cited PEP language may rightfully reside in an employee handbook; however the standards cited above are too subjective to provide notice of specific performance standards as required of a disciplinary rule. See In re Gutierrez, CSB 65-11A, 2 (4/4/13).
an upset customer was wrongdoing, but cited no rule, regulation, order, or other duty which makes that transfer wrongful under this rule. No violation is established under this rule.

E. 16-60 M. Threatening, fighting with, intimidating, or abusing employees or officers of the City, or any other member of the public, for any reason

The Agency's allegations underlying this claim form the cornerstone of the Agency's case. The Agency alleged Werther violated this rule three ways: when he slammed Dewar's door and screamed at him; by taking a threatening posture toward Dewar; and, in the presence of customers, when he yelled or sniped at Serrano "don't tell me you don't leave documents in your drawer." [Agency closing statement; Dewar testimony; Johnson testimony; Exhibit 2-3].

1. Slamming door, yelling at supervisor. Werther stated he may have closed Dewar's door firmly, but denied he slammed it; he also stated Dewar's door hinge is faulty, which may have resulted in a loud noise when he closed it. He also testified he did not yell at Dewar or Serrano. [Werther testimony].

The preponderant evidence supports the Agency's assertions. First, Werther's responses were inconsistent. He claimed he did not slam Dewar's door, but also claimed the door hinge was defective, resulting in the door slamming unintentionally when he closed it. No one else, including Dewar, found the door slammed any other time. In addition, several employees heard Dewar's door slam at the time Werther entered. They stated the sound took them aback and noticed it caused customers to stop their business and turn in the direction of the noise. The same employees also said they heard yelling from Dewar's office, including: (1) Svalberg, who testified for Werther, recalled "[Werther] got up from his chair and went to [Dewar's] office and the door slammed." She also observed him telling Serrano "don't tell me you don't leave documents in your drawer." [Exhibit B]. (2) Guzman, whose office is next door to Dewar, recalled hearing Dewar's door slam and hearing yelling which interrupted his meeting. [Guzman testimony]. Werther did not dispute that Guzman told him to cease all discussion and leave Dewar's office. (3) Serrano credibly testified, without rebuttal, that she saw Werther enter Dewar's office at the time the door slammed. She, as Guzman, recalled customers stopping their business to stare in the direction of the slammed door. [Serrano testimony; Guzman testimony]. (4) Deborah Gokey was in a meeting with Guzman when she heard a loud BANG [sic] "like a door slamming." She recalled seeing "customers at the counter with their jaws dropped and staring." [Exhibit K]. Notably, Gokey's statement was offered by Werther, obviating the prospect of prejudice. (5) Johnson reviewed video of the scene at the time of Werther's interaction with Dewar and saw customers' heads turning toward Dewar's office at the time the door was being slammed. [Exhibit 2-5]. Werther's assessment, that he used a "mild tone" with Dewar, is not supported by independent witnesses who heard screaming or yelling. Werther's response, that he was merely "defending" himself against Dewar's accusations is irrelevant under this rule, since abusive conduct "for any reason" constitutes a breach. Werther's slamming his supervisor's door and yelling or screaming at him establishes a violation of CSR 16-60 M.

2. Threatening posture. The most egregious accusation under this rule is not established. While Guzman testified that when he entered Dewar's office after hearing yelling next door, he observed Werther leaning over Dewar's desk in a threatening manner. Johnson, however, reviewed video of the encounter and observed no threatening action. [Johnson testimony].

3. Snide remark to co-worker. With respect to Werther's snide remark to Serrano, even assuming the Agency's allegations to be true - Serrano was offended by Werther's comment and customers were present - those allegations are insufficient to establish a violation of CSR 16-6 M. Minor personal affronts are more appropriately addressed under CSR 16-60 O.
minor, offensive remark violated this rule, then violations of 16-60 M., and O. would be indistinguishable, and would diminish the gravity of the more serious offenses contemplated under 16-60 M. Accordingly, the Agency did not establish that Werther's snide remark to Serrano violated CSR 16-60 M.

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

Having established that Werther yelled or screamed at his supervisor, the Agency proved Werther violated CSR 16-60 O. for his deportment toward his supervisor. Werther's argument, that he was just defending himself against Dewar's "aggression" by speaking in an "elevated voice," [Werther testimony], even if true, would not justify his own misconduct. Werther could have left, or he could have reported Dewar's improper conduct. Also, Werther's claim that he was not yelling or screaming at Dewar is undermined by his acknowledgement that Guzman came next door to tell him to cease all discussion and to leave, and by multiple ear-witnesses.

Unrebutted witnesses also observed Werther making a snide remark to co-worker Serrano while Serrano was serving customers; Serrano recalled being "offended" by Werther's remark to her, in front of customers when he said "don't tell me you don't hold documents for three weeks." However, that testimony, alone, did not establish their working relationship was negatively affected. Also, there was no evidence the customers Serrano was assisting were offended by or even heard the remark. No violation is established for Werther's behavior toward Serrano under this rule.

G. 16-60 Y. Conduct which violates the [Career Service] Rules, the City Charter, the Denver Revised Municipal Code, Executive orders, or any other applicable legal authority.

The Agency alleged Werther violated this rule via Executive Order 112, Violence in the Workplace. The Agency specified the following language from that executive order.

Executive Order 112: Violence In the Workplace

The actual or attempted... threatening behavior, verbal abuse, intimidation, harassment... swearing at or shouting at...

The Agency failed to establish that Werther leaned over Dewar's desk in a threatening manner. His remark to Serrano, for reasons stated above, did not violate this rule. However, Werther's yelling or screaming at his supervisor constitutes verbal abuse in violation of this rule.

If Dewar, as alleged by Werther, yelled at Werther or at co-workers on other occasions, that would be a matter for a separate agency action. A wrongful act by another employee [and none was established here] does not obviate wrongdoing by the first.

H. 16-60 Z. Conduct prejudicial...

The Career Service Board has declared repeatedly that a violation of this rule requires proof the Agency, or the City, suffered actual harm. [See, e.g., In re Jones CSB 88-09 (9/29/10), and other cases cited therein]. The Agency's claim, that Werther's actions compromised the reputation of the office to the public, [Guzman testimony; agency closing statement], lacked supporting evidence. Similarly, the Agency's assertion that Werther's actions were prejudicial to the good order and effectiveness of the agency, [agency closing], skipped to a legal conclusion without supporting evidence. The presence of
members of the public during Werther’s outbursts was insufficient to prove actual harm to them. No violation was established under this rule.

IV. APPELLANT’S WHISTLEBLOWER CLAIM

The City’s Whistleblower ordinance prohibits a supervisor from imposing, or threatening to impose, any adverse employment action in response to a subordinate’s disclosure of official misconduct. In order to establish a claim under the whistleblower ordinance, Werther must show he:

1) disclosed official misconduct
2) to an appropriate reporting authority, and
3) suffered an adverse employment action
4) on account of that disclosure.

[DRMC §§ 2-107,108; In re Hamilton, CSA 100-09[9/17/10]].

It is apparent Werther suffered an adverse employment action - his four-day suspension. Only the remaining three elements of his claim remain at issue.

1. Disclosed official misconduct.

There are two subparts to this element. The word “disclosed,” is not defined in the ordinance and not well defined elsewhere. It encompasses the notion of communicating something secret. [BLACK’S LAW DICTIONARY, ABRIDGED 6TH ADDITION]. The Agency did not dispute that Werther provided information to the Auditor’s Office concerning an Agency practice Werther believed was unlawful. That communication fits the notion of a disclosure and therefore fulfills the “disclosed” portion of this element.

The second subpart, “official misconduct,” pertains to the nature of the information disclosed. The ordinance defines official misconduct to include a violation of law. [DRMC 2-107(d)]]. Werther claimed the Agency’s official misconduct was its failure to record real estate documents timely, in violation of Colorado Revised Statute (CRS) section 30-10-409(2). That section of the statute is so convoluted that it resembles a highway interchange designed for head-on collisions. Nonetheless, the gist of CRS 30-10-409(2) requires the Agency to endorse and enter documents it receives into its official log no later than 5:00 p.m. of the day following receipt, absent extenuating circumstances which do not apply here.

While there was much debate whether Werther’s disclosure contained “official misconduct” as defined by the Ordinance, in the end, the Agency admitted it does not comply with the timeliness requirements of that law. [Johnson testimony; Valencia testimony; Svalberg testimony; Guzman cross-exam (“The policy of the Clerk and Recorder is that we record documents within three business days”)]. Johnson specifically acknowledged the quit claim deed referenced above, [Exhibit H], was not recorded timely. Werther’s disclosure of the Agency’s belated recordation of a document it was bound by law to record two weeks earlier, met the definition of official misconduct within the ambit of the Whistleblower Ordinance. Werther established the “official misconduct” element of his whistleblower claim.

With respect to the 10 checks Werther attached in his email to the Auditor, he acknowledged there was no information on, or attached to, any of the checks which identified when they were received. [Werther cross-exam]. His only evidence was the position of the checks in a stack of other documents, which is insufficient proof of the date

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2 Dewar acknowledged the document was ready to record by January 4, but it was not recorded until January 18, only after the customer complained. [Dewar cross-exam; Exhibit H].
the Agency received them. Thus, as regards the checks he provided to the Auditor, Werther failed to establish, by a preponderance of the evidence, that his disclosure of those checks concerned official misconduct.

2. An appropriate reporting authority

The City’s Whistleblower Ordinance defines “appropriate reporting authority” as any person or entity empowered to receive, investigate, or act on reports of official misconduct. [DRMC 2-107 (a)]. The ordinance specifically includes the City Auditor’s Office as an appropriate reporting authority. DRMC 2-107 (a)(3).

The Agency argued Werther’s disclosure to the Auditor’s Office, [Exhibit C], was improper because he should have first notified a supervisor. [See Agency closing argument, p.14]. The Whistleblower Ordinance does not require an employee to forewarn his own agency prior to making a disclosure, only to provide “an appropriate reporting authority” the information to be disclosed. Werther fulfilled this element by contacting the Auditor’s Office.

3. On account of

This element of a whistleblower claim requires the proponent to establish a causal connection between his disclosure and his being subject to a subsequent adverse agency action, or threat thereof. The Agency claimed Werther violated this element because his motive for disclosure was, in essence, impure. In revealing what it considered to be “the most damaging testimony in this entire case,” the Agency concluded “Mr. Werther sought to use the Whistleblower Ordinance to protect himself from being disciplined rather than for the purpose set forth in the ordinance.” [Agency closing statement]. The motive for a whistleblower disclosure is irrelevant. Even if an employee makes a whistleblowing disclosure primarily to avoid being disciplined, that purpose does not render invalid the disclosure.


One factor which may establish a connection between a disclosure and an adverse agency action is the proximity in time between reporting official misconduct and the subsequent adverse agency action. While the ordinance does not limit the time between a disclosure and an adverse action, Werther’s claim that he reported misconduct to a prior Clerk and Recorder in 2006 is too remote as a matter of law to infer the adverse action (suspension) by a supervisor (Johnson) was made “on account of” Werther’s disclosure in 2006 to a person no longer in authority. Similarly, his alleged reporting of official misconduct to Johnson in 2011 and 2012 is too remote to link his suspension in 2013 to disclosures more than one year earlier. Moreover, Werther claimed he reported the Agency’s failure to record documents timely during one of Johnson’s open door meetings in 2011. [Appellant written closing, p.2]. However, Johnson did not begin her open door policy meetings until 2012. [Exhibit 7], making it unlikely his 2013 suspension was imposed “on account of” an alleged 2011 disclosure.

With respect to Werther’s January 18, 2013 disclosure, within one hour after his encounter with Dewar, Werther sent copies of 10 checks and a quit claim deed to the Auditor’s Office. His email stated only “[o]ld checks just handed to me today.” [Exhibit C]. It is not surprising the Auditor’s Office was perplexed by the submission. Ultimately, Werther

3 The U.S. Supreme Court recently revised Title VII retaliation claims to require the employee to prove his protected opposition to discrimination was the “but for” cause of a subsequent adverse agency action, rather than a less-restrictive “motivating factor,” University of Tex. Sw.Med. Ctr. v. Nassar, U.S., No. 12-484 (6/24/13). It seems doubtful that decision affects the level of proof required in the City’s Whistleblower Ordinance, as the Career Service Board may expand the protections of federal law See, e.g. In re Gallo, CSB 63-09, 5 (3/17/11).
proved at least the quit claim deed was recorded untimely, but that fact, while establishing the element of official misconduct, does not establish a causal connection to his suspension. In summary, Werther failed to establish the "on account of" element of a whistleblower claim.

Even if Werther had established each element of his whistleblower claim, the inquiry would not end there. Whistleblower claims require a burden-shifting analysis. When an employee establishes that his whistleblowing was a substantial or motivating factor for the agency's adverse action against him, the burden shifts to the agency to establish that it was justified in taking the adverse action regardless of the employee's whistleblowing. Taylor v. Regents of University of Colorado, 179 P.3d 246 (Colo. App. 2007). The Agency established Werther's wrongdoing against Dewar and the consequent violation of Career Service Rules for that conduct. Therefore, even if Werther had established his whistleblower claim, the Agency was justified in imposing discipline. All that remains, then, is the question of the appropriate degree of discipline.

V. DEGREE OF DISCIPLINE

A hearing officer must not disturb an agency's penalty determination unless the determination was clearly excessive or based substantially on considerations unsupported by a preponderance of the evidence. City and County of Denver v. Weeks, 10CA1408, 19-21 (Colo. App. 10/13/11). The Career Service disciplinary rules require an evaluation of the following three factors to make that determination. CSR 16-20.

A. Seriousness of Proven Offenses

Werther's outburst not only startled co-workers and customers, but set poor precedent for the chain of command. City agencies exist to provide particular services to the public, so yelling or screaming in anger in a workplace, particularly where members of the public are always present, is a serious offense. That Werther's supervisor was on the phone trying to assuage a customer at the same time Werther was yelling or screaming at him is an aggravating factor.

B. Past Record

This was Werther's first disciplinary incident. The Agency stated Werther is good employee and dedicated to his job. [Agency closing statement]. His record is a mitigating factor.

C. Likelihood of Reform

Based only on his past record, there is no reason to believe Werther could not reform his behavior. However, Werther's continued denial of responsibility for his evident misconduct raises some concern about his willingness to accept responsibility for his actions, a prerequisite to lasting reform.

The Agency failed to prove most of the violations it alleged against Werther; however it proved one serious breach of the Career Service Rules, abuse of a co-worker, and another related violation of failing to maintain satisfactory working relationships. On balance, a minor penalty is justified, so the question remains whether a four-day suspension was clearly excessive or decided outside the bounds of evidence in the case.

or even the "but for" cause of the adverse action, if the Nassar case were to apply here. See n. 4.
If all violations in this case carried equal weight in the Agency's eyes, then a four-day suspension would have been excessive, since most of the bases for assessing that penalty would have been unfounded. However, the Agency emphasized that it disciplined Werther: primarily for his untoward behavior toward Dewar; to a lesser degree for his conduct toward Serrano; and not at all for his reporting alleged misconduct to the Auditor's Office. Thus, even though many violations were unproven, the misconduct which the Agency found most significant in determining the appropriate degree of discipline was proven. Thus, while the Agency could have chosen a lesser penalty, its decision to assess a four-day suspension was not clearly excessive and was supported by the evidence.

VI. ORDER

For reasons stated above, the Agency's election to suspend Werther for four days is AFFIRMED.

DONE August 2, 2013.

Bruce A. Plotkin
Career Service 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 for filing a petition for review are available at http://www.denvergov.org/Portals/672/documents/CSA_Rule_19.pdf

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.