HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 109-06

DECISION

IN THE MATTER OF THE APPEAL OF:

RAY YOUNGER
Appellant,

vs.

DEPARTMENT OF PUBLIC WORKS, PERMIT OPERATIONS & RIGHT OF WAY ENFORCEMENT,
and the City and County of Denver, a municipal corporation,
Agency.

I. INTRODUCTION

The Appellant, Ray Younger, appeals a seven-day suspension, assessed by his employer on November 22, 2006, for alleged violations of specified Career Service Rules, Agency regulations, and an executive order. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on March 6, 2007. The Agency was represented by Karla Pierce, Esq. The Appellant represented himself.

Agency Exhibits 1-13 were admitted, and Exhibits 14-17 were withdrawn. Appellant's Exhibits E-K, N-W, and Z were admitted, Exhibits L, M, and X were withdrawn, and Exhibits A-C, and Y were not admitted. The following witnesses testified for the Agency: Carol Whiting, Bill Murphy, Frank Ooms, and Lindsay Strudwick. The Appellant testified on his own behalf, and presented witnesses Tanya Portillo and Brian Charles.

II. ISSUES

The following issues were presented for appeal:

1. whether the Appellant violated any of the following Career Service Rules: 16-60 K, L, M, O, Y, or Z; 2. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to suspend the Appellant for seven days conformed to the purposes of discipline under CSR 16-20.

III. FINDINGS

The salient facts are not disputed. The Appellant is employed as a Vehicle Control Agent (VCA). His primary duty is to write parking tickets. VCAs are frequently confronted by upset or even hostile recipients of parking tickets. For that reason, VCAs are trained not to respond in kind, and are trained how to defuse explosive citizens.[1] If they cannot de-escalate an angry citizen, VCAs are trained to call for supervisor assistance or to leave if the citizen becomes abusive. [Whiting testimony, Exhibit 4 transcript, p.2, Exhibit Z]. VCAs are required to maintain a respectful and cooperative attitude at all times, even when faced with an angry citizen. [Exhibits 1-28, 1-29, 1-33, 1-40, 2-1]. This last requirement places VCAs in the unenviable position of having to meet substantial quotas of parking citations [Exhibit 1-31, and having to react cooperatively with hostile citizens they encounter, [Exhibit 1-40], while, at the same time, having no discretion to alleviate hostility by taking back a citation after hearing from the citizen. [Exhibit 1-32].

On July 6, 2006, the Appellant was on duty in the Cherry Creek neighborhood, an area which is particularly volatile for VCA-citizen interactions. Frank Ooms was pulling away from the curb in front of his Cherry Creek home when a contractor working next door called to him. Ooms stopped, and the contractor walked around to the driver's side of Ooms' car to speak with him about some possible inconvenience related to the construction next door. The front of the Ooms' car was about three feet from the curb and partially into the lane of traffic when the Appellant arrived and directed Ooms to move or be ticketed. The Appellant started to drive off, looked in his rear-view mirror, saw Ooms' car was not moving, and also saw on Oom's face an expression the Appellant decided was one of non-compliance. [Appellant testimony]. In response, the Appellant backed up and repeated his directive more firmly. Ooms began backing up to maneuver out of the parking space, but stalled his vehicle when the rear tire hit the curb. The Appellant didn't realize Ooms stalled his car, so he repeated his order sternly. A less-than-convivial exchange followed. Ooms told the Appellant not to be such a jerk. [Ooms testimony, Exhibit 7-2]. The Appellant thought "you all think we're all just jerks and assholes, so I'm gonna give you a ticket now." [Appellant testimony]. As the Appellant began to write a citation for obstructing traffic, Ooms drove off to avoid being served. Re-thinking this strategy, Ooms circled around and found the Appellant at a nearby location, engaged in an altercation with another citizen, Lindsay Conley. [Exhibit 4 transcript, p. 4, Murphy testimony, Appellant testimony, Exhibit 7-2].

Conley had just pulled over to take a phone call when the Appellant arrived fresh from his encounter with Ooms. The side of the street where Conley parked was posted to restrict parking to those vehicles displaying a residential parking permit. The Appellant pulled his city code enforcement vehicle along side Conley's car within inches of the driver-side mirror. He instructed Conley, through Conley's rolled up

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[1] Training includes police department training in conflict resolution, conflict training by the Career Service Authority, and ongoing team meetings at the Agency. [Whiting testimony].

window, to move or be ticketed. Conley did not comply, nor did he lower his window, but continued his phone conversation. Eventually, Conley addressed the Appellant, informing him he was not parked. A colloquy ensued over the definition of being parked. "He told me that he wasn't parked. Well I told him he was parked. He told me he wasn't parked." [Exhibit 4 transcript, p.3, Exhibit 8].]

At that moment, Ooms arrived and joined the fray. He asked the Appellant if he had written a ticket for the earlier incident. The Appellant responded by handing Ooms the citation he wrote while Ooms drove off. Conley demanded the Appellant's name and badge number. The Appellant replied "are you sure you want to get my name and badge number?" When Conley replied "yes," the Appellant filled out a citation, and handed it to Conley. Conley asked "what is this?" the Appellant replied "[y]ou wanted my name and badge number, here it is." [Exhibit 8, Exhibit 1-7, Exhibit 4 transcript, p.3]. During all this time, including the initial incident with Ooms, the Appellant was engaged in a private cell-phone conversation with a female friend, Tanya Portillo, who overheard only parts of the various conversations when the Appellant put down the phone to speak with Ooms and Conley. [Portillo testimony, Exhibits 1-7, S, T, Q].

During the second incident, the Appellant uttered one of the following three sentences either directly to Ooms or to Portillo, loud enough for Ooms to hear. "If you weren't so old I'd whoop your ass," [Ooms testimony, Exhibit 7-2, Exhibit 8-2, Exhibit 10]. "He's too old to whoop anybody's ass." [Appellant testimony, Exhibit 4, line 280]. "He may be taller but I think I could take him. [Exhibit 6-1].

Both the Appellant and Ooms called for the police. The responding officers found no criminal violation, but asked for the Appellant's supervisor. Carol Whiting, the Appellant's direct supervisor arrived and spoke with the three parties. Whiting conducted additional investigation and reported her findings to the Agency head, Lindsey Strudwick. Strudwick solicited email synopses of the July 6 events from Ooms, Conley, and Murphy. [Exhibits 7, 8, 12, 13]. The Appellant replied to those emails in writing. [Exhibit 9]. A pre-disciplinary meeting was convened on August 29. The Appellant appeared with his attorney. Following the meeting, but before the Agency imposed discipline, the Appellant sustained an injury which forced him off the job for several weeks. The Agency rescinded the initial notice of discipline. After the Appellant returned to work, the Agency repeated the pre-disciplinary process including a second pre-disciplinary meeting, held on November 8. The Appellant appeared *pro se*, gave an extensive statement concerning the events of June 6, [Exhibit 4], and waxed philosophically about the nature of Cherry Creek residents.[2] [Exhibit 4 transcript, lines 227-241].

On November 21, 2006, the Agency served its notice of suspension on the Appellant, effective the following day. This appeal followed on December 6, 2006.

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[2] "Cherry Creek is a, they're above the law, they're above everything out in Cherry Creek... I don't know if it's because the people feel that you cannot tell them what to do because the taxes they pay, or what they paid for the price of their house..."

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR 19-10 A. 2. as a direct appeal of the Appellant's discipline. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

In a disciplinary appeal, the agency bears the burden of persuasion to prove the employee violated one or more cited sections of the Career Service Rules, and to prove the degree of discipline complied with CSR 16-20. The standard by which the Agency must prove its claims is a preponderance of the evidence.

C. Career Service Rule Violations

1. CSR 16-60 K. Failing to meet established standards of performance including either qualitative or quantitative standards. When citing this subsection, a department or agency must describe the specific standard(s) the employee has failed to meet.

This rule covers performance deficiencies that can be measured by qualitative or quantitative standards, such as those one would find in a performance evaluation. In re Hernandez, CSA 03-06, 7 (5/3/06). The Agency cited several performance standards taken from the Appellant's annual performance review known as a Performance Enhancement Program Report, or PEPR.

> **Accuracy of Citation Issued – Employees are expected to issue citations in a reasonable manner. Questions related to issuance and/or enforcement will be directed to a Supervisor... [Exhibit 1-32].**

The term "reasonable manner" is not defined, [Exhibit 1-32]. The Agency found the Appellant in violation of this standard for the manner in which he issued tickets to Ooms and Conley. [Strudwick testimony, Exhibit 2-4, 2-5]. The Appellant affirmed he could have handled both situations differently, [Whiting testimony], but avowed the citations were proper under the Denver Revised Municipal Code. He insisted there was nothing improper about the manner in which he dealt with Ooms and Conley.

VCAs are required to provide their name and badge number in a respectful manner to citizens who request that information. "Professionally and politely give name and badge number when requested." [Exhibit 1-40]. This instruction is deemed a top priority. *Id.* The Appellant stated his response to Conley's request for his name and badge number was "are you sure you want to get my name and badge number?" Then, when Conley said "yes," the Appellant wrote out a citation and handed it to Conley. There is no way to interpret this manner of issuing a citation other than as a mean-spirited response to Conley's proper request for the Appellant's name and badge number. The Appellant's response - that the citation was for a proper reason - even if true, is irrelevant to the manner in which it was issued. Thus, when a citizen requests the name and badge number of a VCA, responding by challenging the request and issuing a citation is an unreasonable manner in which to issue a citation, in violation of this PEP standard.

> **Internal/External Professional Relations and Communications – Employees are expected to maintain an attitude of respect and cooperation with... the public at all times. All issues are to be handled in a professional manner and through the proper chain of command. Maintain a professional and impartial attitude toward complainants and violators. Professionally and politely give name and badge number when requested. Professional, courteous, and polite during interactions...** [Exhibit 1-40].

It was clear from the Appellant's testimony that he issued Ooms a citation, rather than a warning, because he was offended by Ooms' look, and in response to Ooms' calling him a jerk ("I was proceeding south, down Columbine, when I looked in the mirror and I saw the disgusted look on his face...so that's when I backed up") ("You think we're all jerks and assholes, so I'm gonna give you a ticket now"). Similarly, the Appellant took offense at Conley's asking for his name and badge number as shown by his challenging response: "are you sure you want my name and badge number?" The Appellant then issued a citation, as if to say "that's what you get for asking." The Appellant's aggressive manner, his failure to give his name and badge number politely, and his lack of courtesy constitute a violation of the above-stated PEP requirement.

2. CSR 16-60 L. <u>Failure to observe written departmental or agency regulations, policies or rules</u>.

The Appellant signed for and received a copy of the Agency's rules and regulations. [Exhibit 2-2]. The Agency claimed the Appellant violated the following Public Works Department Rules.

A. Workplace Violence.

This rule repeats, virtually verbatim, Executive Order 112. My analysis appears *infra*.

G. Public Contact

Employees must conduct themselves with courtesy and helpfulness to fellow employees and the public at all times... and will refer any persons with questions or complaints about the job to their supervisor.

This regulation should not be used to discipline VCAs for any perceived affront, but should be reserved for those interactions where an objective person would perceive significant ill-will or mean-spiritedness in the VCA's actions or words.

The most objective testimony presented in this case came from William Murphy, the contractor working next door to Ooms' house. The most egregious claims by the Appellant and Ooms against each other were not borne out by Murphy. Ooms claimed the Appellant used foul language even during their first encounter, but Murphy did not remember such language even though he was present throughout the first encounter. On the other hand, Murphy was miffed by the Appellant's lack of courtesy, repeatedly referring to the Appellant's attitude as "belligerent" and "aggressive." [Murphy testimony, Exhibit 12]. Murphy defined these terms as not polite, not courteous, giving commands, frowning, scowling, curtly repeating his order to pull in or be ticketed, failing to give any time after his command for Ooms to comply. Murphy also remembered the Appellant stating sharply "you need to get closer to the curb or you're going to get yourself a ticket right now." None of these descriptions rises to the level of objective discourtesy or unhelpfulness. However, in the Appellant's encounter with Conley, his discourtesy was evident, as he issued a citation in response to Conley's legitimate request for the Appellant's name and badge number. For this reason the agency proved the Appellant violated this regulation.

3. CSR 16-60 M. <u>Threatening, fighting with, intimidating, or abusing employees or officers of the City, or any other member of the public, for any reason</u>.

There was conflicting evidence as to what words the Appellant spoke and to whom they were spoken. The Appellant admitted he said to Portillo "he [Ooms] may be taller, but I think I could take him." He also admitted Conley heard this comment, but denied Ooms could hear it. [Exhibit 6-1, Appellant testimony]. According to Ooms, the Appellant stated directly to him "if you weren't so old I'd whoop your ass." Exhibit 7-2, Appellant testimony]. I doubt the Appellant made such a statement to Portillo, because she denied hearing such a statement, even as she recalled other details of the conversation. [Portillo testimony]. Therefore, it more likely the Appellant made some form of his bravado statement directly to Ooms. The Appellant's statement, in sandbox poker fashion, invited Ooms to ante up (I called you too old to bother whooping, so what are you going to do about it). However, even if the Appellant directly addressed Ooms, his statement cannot be construed as a threat since it

rejects intent to assault ("because you are old I will not assault you").

A threat requires that a reasonable person would interpret the information conveyed by the actor as an intent to injure or to kill someone, or to damage or to destroy someone else's property. Denver Revised Municipal Code §38-92. I find it unlikely Ooms was actually threatened by the Appellant, since he launched his own salvo by telling the Appellant to quit acting like a jerk, or worse. For these reasons, the Agency failed to prove this violation.

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

VCAs are required to maintain a respectful and cooperative attitude at all times, even when faced with an angry citizen. [Exhibits 1-28, 1-29, 1-33, 1-40, 2-1]. The Appellant was sufficiently rude in his conduct with Ooms to astonish Murphy, an independent observer. The Appellant also assessed a citation to Conley in a manner that was disrespectful. The Appellant's response that the citations were justified, while true, is not relevant to the Appellant's obligation to maintain a civil manner in issuing the citations. His failure to do so was a violation of CSR 16-60 O.

5. CSR 16-60 Y. Conduct which violates the Rules, the City Charter, the Denver Revised Municipal Code, Executive orders, or any other applicable legal authority.

Executive Order 112.

This order prohibits the use or threat of violence. Strudwick concluded the Appellant violated the order because Ooms was intimidated by the Appellant's remark "if you weren't so old I'd whoop your ass."

As in CSR 16-60 M, above, a threat requires that a reasonable person would interpret the information conveyed by the actor as an intent to injure or to kill someone, or to damage or to destroy someone else's property. Denver Revised Municipal Code §38-92. Under this definition, the Appellant statement, that he intended not to assault Ooms, could not reasonably be interpreted as a threat.

In addition, it is not clear the Appellant told Ooms "if you weren't so old I'd whoop your ass." Murphy's objective testimony, contrary to Ooms insistence that the Appellant did not use any vulgar language, brings into question Ooms credibility concerning the degree of the Appellant's aggression at their second meeting. Finally, Ooms aggressive response to the Appellant indicated he was not intimidated by the Appellant. For these reasons, I find the Agency failed to prove the Appellant violated Executive Order 112 by a preponderance of the evidence.

6. CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

To sustain this violation, the agency must prove the Appellant's conduct hindered the agency mission, or negatively affected the structure or means by which the agency achieves its mission. In re Simpleman, CSA 31-06, 10 (10/20/06). The top priority for all agencies is "to achieve the highest customer service rating in the country." [Exhibit 1-28]. Another city-wide priority is to meet a work performance standard that

> will Benefit the customer (Citizen, Employee, Official, Vendor, Contractor, etc.). The Goal is to Continually Seek To Exceed Customer Expectations by Being proactive in Identifying and Meeting Their Needs, Working Collaboratively with them to Solve their Problems, while Developing and Maintaining Trusting, Constructive Relationships. [Exhibit 1-28].

The Appellant's surly interaction with Ooms and Conley, established above, is in direct derogation of Agency and city-wide mandates. Murphy's letter demonstrates how the Appellant's actions compromised the integrity of the City. "In my opinion this type of confrontational, aggressive behavior is out of line for a parking officer and representative of the city of Denver." [Exhibit 12]. For these reasons, the Agency proved the Appellant violated this rule by a preponderance of the evidence.

D. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities must consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR 16-20.

The Appellant's actions violated the very mission of the Agency and city-wide directives. Strudwick considered the range of disciplinary options, and considered the Appellant's disciplinary history. The Agency's election to suspend the Appellant for seven days was within the range of reasonable alternatives available to it. The Appellant's continued failure to acknowledge wrongdoing suggests a lesser penalty would not have corrected the inappropriate behavior.

V. ORDER

The Agency's assessment of a seven-day suspension against the Appellant on November 22, 2006, is AFFIRMED.

DONE April 18, 2007.

Bruce A. Plotkin
Hearing Officer
Career Service Board