

**DECISION MODIFYING INVOLUNTARY DEMOTION TO TEMPORARY REDUCTION IN PAY**

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**MUSTAPHA BOUZAIDA**, Appellant,

v.

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

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**I. INTRODUCTION**

Appellant Mustapha Bouzaida (Appellant) appeals the General Services' (Agency) January 24, 2020 demotion of him, for alleged violations of Career Service Rules (CSR) 16-28 A, D, F, I, L, N, and T.<sup>1</sup> On August 4 and 12, 2020, Hearing Officer Federico C. Alvarez conducted a hearing to determine the propriety of the discipline. Assistant City Attorneys Shelby A. Felton and Margaret C. Tharp represented the Agency and David Japha, Esq. And Evan House, Esq. represented Appellant. The Agency's exhibits 1 through 23 and Appellant's exhibits E, F, G, H, I, J, L, M, P, and R were admitted into evidence. Gregory A. Johnson, Director of Facilities Management, Patrick Hendrix, Facilities Superintendent, and George Branchaud, Office of Human Resources (OHR) Operations Coordinator, testified for the Agency; and Appellant testified for himself.

**II. ISSUES**

The issues presented for appeal were whether:

- A. Appellant violated CSRs 16-28 A, D, F, I, L, N, and T; and
- B. the Agency's decision to demote Appellant, if he violated the aforementioned CSRs, conformed to the purposes of discipline under CSR 16-41.

**III. FINDINGS**

On November 5, 2012, the City and County of Denver (City) hired Appellant in the Agency's Facilities Management Division. Since September 22, 2014, Appellant had been a Multiple Trades Supervisor (MTS) until February 2, 2020, the effective date of the Agency's demotion of him to Building Engineer. The Agency demoted him on the alleged CSR violations based on the incidents described below, some of which underly several alleged violations.

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<sup>1</sup> The Agency dismissed CSR 16-28 G. as a basis for the discipline at the start of the hearing.

## Communications Regarding the Lead Building Engineer (LBE) Position

Herein the Agency implemented its September 16, 2019 Written Reprimand to Appellant directing him to cease his untoward emails. In part, the Reprimand stated: "Communicate in a thoughtful and respectful manner-in person and email. ... If you have concerns respectfully address your questions and concerns directly with your supervisor first." (Ex. 23).

The Agency created an LBE position for each of its four teams, including Appellant's team, and filled them as it received funding for them. Appellant's team included himself and his subordinates, three building engineers, two maintenance technicians, and another staff person. Mr. Hendrix supervised the team. The LBE would be subordinate to Appellant and function as a Building Engineer, but also execute Appellant's supervisory duties when he would be absent. Mr. Hendrix testified that the position was designed as a promotional opportunity.

The LBE position was posted only internally that is, open only to City employees. On September 27, 2019, Sergio Botia, OHR Recruiter, notified Mr. Hendrix that the LBE position had been approved, stating, "I will post this internally so we can have your candidate apply to it." (Ex. 1-4) Mr. Hendrix testified that Mr. Brian Hedrick was his candidate, to whom Mr. Botia referred. Mr. Botia then scheduled interviews of three applicants, to which he invited Appellant. Mr. Hendrix and Mr. Botia did not include Appellant in the creation of the LBE position or request his input for it. Appellant learned of the position when he saw it posted. On October 14, 2019, Appellant emailed Mr. Hendrix and Mr. Botia, "Since we have only two candidates who applied, I recommend that the lead engineer position to be open to the public, and not restrict it to CCD employees only. More competition is better." Mr. Botia replied that the position had been "purposely written and designed for internal candidates." (Ex. 1-2, 1-1). Mr. Johnson confirmed in his Disciplinary Letter to Appellant, "On October 14, 2019, you were told the Lead Building Engineer position was created as a promotional opportunity within CCD, and that it was decided it would be posted internally."

The Agency states that three emails by Appellant show the impropriety of his complaints. On October 28, Appellant emailed Mr. Hendrix to object to participating in the interviews, alleging that Mr. Hendrix had created the LBE position to promote Mr. Hedrick so as to retain him. (Ex. 2). Mr. Hedrick had been offered a position at DIA but had declined it. Appellant criticized a promotion as an approach to retaining employees.

On November 5, Appellant emailed Mr. Johnson and Mr. Hendrix, summarizing a meeting among them of October 28. He again criticized the creation of the LBE position and its hiring process, allegedly to benefit Mr. Hedrick. He stated that the Agency instead needed another Building Engineer position. Appellant criticized their refusal to reschedule the interview of Daniel Navarro, absent as he was on mandatory snow removal duty at DIA. He objected to their pressure against him for "opposing their candidate." He denied Mr. Hendrix's claim that Appellant was threatened by Mr. Hedrick as biased and ignorant, as Appellant claimed adequate credentials and experience, and knowledge about his Team members' skills and experience so as to feel no threat from Mr. Hedrick. He again accused Mr. Hendrix of playing politics by promising promotions to subordinates, including Appellant, and of undermining Appellant by excluding him from decisions on his Team. (Ex. 4).

At hearing, Mr. Hendrix testified that the fact that Mr. Navarro failed to appear for his interview showed that he had no interest in the position. He also noted that Mr. Navarro had not called in to advise that he would not show up for the interview.

On October 29 and 30, Mr. Hendrix and Appellant communicated by email about the status and progress of Building Automation System (BAS) for regulating the temperature at the 1245 Champa building. In them, Appellant stated he would take over the work as what others had done was not yet effective. They discussed Mr. Hendrix's exclusion of Appellant when Mr. Hendrix communicated with Appellant's (and Mr. Hendrix's) subordinates, including Mr. Hendrick, which Mr. Hendrix defended as appropriate and within the chain of command. Appellant learned that Mr. Hendrick created a plan for the BAS and shared it with Mr. Hendrix but not with Appellant. Appellant then accused Mr. Hendrix of engaging in a virtual political campaign and requested that Mr. Hendrix cease the "interference." (Ex. 3).

### Infor Work Requests

Mr. Hendrix testified that part of Appellant's job was to submit work requests into the Infor system. Mr. Hendrix stated that at some point in October 2019, he directed Appellant to submit requests into Infor for his work on the 1245 Champa Building and, on October 24, 2019, reminded Appellant to do so when Appellant finished work on a unit on the building roof. On October 29, Mr. Hendrix stated by email to Appellant, "Also, so that we can show the tenants that we are working on the building please log all work you perform at 1245 Champa in Infor." (Ex C-4). Mr. Hendrix also requested that Appellant submit a progress update on his work at the building at 1245 Champa Street. On October 30, Mr. Hendrix reiterated to Appellant to enter his time into the Infor system within the conversation about work at the 1245 Champa Building. (Ex. C 3-2).

On November 13, 2019, Mr. Hendrix met with and reminded Appellant of his need to submit Infor Work Requests anytime that Appellant completed work on a building. Appellant responded that he understood this responsibility and had no issue complying with it. On November 20, 2019, when Mr. Hendrix again reminded Appellant of the need to input his time into the Infor system, Appellant created entries into Infor for the work he completed on November 20, and October 23 and 24 at the building. (Ex. 7). On December 10, 2019, Appellant input his time into the Infor system but did not do so for other days from October 24, 2019 through December 23, although he responded to this building at least once a week.

Mr. Hendrix testified that the majority of the MTS staff do not enter their time into the Infor system regularly, that Appellant had not entered his time into Infor before October 2019, and that he expected, but had not previously directed, Appellant to do so. He stated that he had now required it of Appellant for work at the 1245 Champa building because the Agency could bill its two tenants for that work. Mr. Hendrix did not testify when the tenants would be billed or its rates, or how the Agency had managed said billing before October. He testified that he expected Appellant to input his time weekly.

Mr. Johnson testified that the Agency used Infor as its main tracking data platform to manage assets and performance and to make business decisions. He also testified that he did not review Appellant's Infor data to confirm whether Appellant had not input his hours into Infor previously, as Appellant had testified.<sup>2</sup> He said nothing about billing the tenant. He testified that the input was best if done promptly when the memory of the work was fresh.

### Trash Fence Lock

Mr. Hendrix testified that, on October 22, 2019, he directed Appellant to place a lock on the trash fence at the Minoru Yasui building for security reasons, as homeless people were moving into the area and becoming aggressive toward the staff. He stated that Appellant responded that he would install the lock the next day. On November 1, the Security Daily Activity Summary shows that a custodian at the building called to complain about homeless people in the trash area, although not on October 22, which the Denver Police dispersed. (Ex. 5). The building custodian placed their lock on the fence. On November 7, 2019, Building Engineer Anthony Payan cut off that lock, as they had lost its key, and replaced it with an Agency lock.

Appellant testified that the delay in installing the lock was Mr. Hendrix's indecision about which type of lock to use. He stated that once Mr. Hendrix decided on a lock, he provided it to Mr. Hendrix immediately. He also stated that he would not have installed the lock personally. Mr. Hendrix testified that he did not care which lock the Agency placed at the site.

### The DIA Interview

On November 15, 2019, Appellant did not come in to work at his scheduled start time of 7:00 a.m., although he had confirmed to Mr. Hendrix the prior day that he would do so. Appellant had then advised Mr. Hendrix that he would be leaving from 8:00 to 10:00 a.m. for a 10:00 to 11:00 interview for a City position at Denver International Airport (DIA). Mr. Hendrix had approved Appellant's time off to interview but had asked Appellant whether he would be in to work at 7:00 a.m. Appellant testified that, later that day, the interviewing administrator asked him to arrive earlier for the interview, apparently to take a test before it. He then decided to go straight to DIA in the morning since he would not have meaningful time at the Webb Building before the interview. He stated that he tried unsuccessfully to contact Mr. Hendrix to advise him of this change of plans. Mr. Hendrix was off work on November 15 but came to his office at 7:00 to check on Appellant, who was absent, and to retrieve some documents. Around 9:00 and 10:40, he first emailed and then texted Appellant, who did not respond, asking if Appellant was ok. (Ex. 6). Appellant arrived at the office around noon this day.

The next Monday, Mr. Hendrix confronted Appellant about his late arrival and failure to give notice of his delay. Appellant justified his delay with needing the time to prepare more for his interview, and described it as no big deal, unless Mr. Hendrix wanted to make it a big deal. Appellant volunteered to take personal time off for his delay, in spite of the City policy of allowing its employees to interview for other City positions during their work time. Appellant described an example where Mr. Hendrix authorized Appellant's subordinate to take time off

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<sup>2</sup> As the Agency's advisory witness, Mr. Johnson heard the testimony on this topic one week earlier.

and travel in a City truck to an interview at DIA, but complained that neither of them advised Appellant in advance of the subordinate's absence. Appellant also testified that he had never been late or missed a day of work during his tenure with the City.

Mr. Johnson stated in his letter of discipline that, after his response to Mr. Hendrix about his late arrival, Appellant described cultural differences and stated, "it's just a known fact that Moroccan's are more intelligent than Americans and can communicate better." (Ex. 15-4).

### Agency Meeting

On November 20, 2019, Appellant failed to attend a mandatory Agency Employment Engagement meeting. A Maintenance Technician also did not attend and so advised Appellant later that day. Mr. Hendrix overheard Appellant tell the Technician that his absence was no big deal and that meetings are a waste of time. At hearing, Appellant stated that attendance at that meeting was not necessary as an employee survey would be discussed and the Agency would distribute the survey later by email anyway.

### OHR Secured Area Access

On December 18, 2019 at 12:46 p.m., Appellant sent an email to Karen Niparko, OHR Executive Director, inquiring whether she could attend a meeting at 1:00 p.m. among Appellant, his supervisors, and Senior OHR Business Partner Karen Westendorp. He wanted Ms. Niparko to monitor Ms. Westendorp's performance, stating, "I complained about my superintendent to the director and my expectations of [Ms. Westendorp] that she is not a neutral." After the meeting, at 1:33 p.m., Appellant accessed the secured OHR office with his employee badge and asked Mr. Branchaud if Ms. Niparko was available. He had no appointment to meet with her. Mr. Branchaud told Appellant that she was not in the office, but she would address his email later and Appellant left. Their exchange lasted about a minute.

Mr. Branchaud testified that he had reviewed Appellant's email to Ms. Niparko of earlier that day as his duties include screening her email. He recognized Appellant because Appellant had previously scheduled and attended a meeting with Ms. Niparko. However, Mr. Branchaud was uncomfortable with Appellant's presence in the OHR office. Appellant had not checked in with the receptionist before accessing it and was thus unannounced to Mr. Branchaud. Since Appellant had an appeal before the Career Service Board, Mr. Branchaud determined that Appellant's continued communications with Ms. Niparko should cease.

On December 19, 2019, Mr. Johnson and Mr. Hendrix met with and directed Appellant to not abuse his employee badge privileges. They directed him to not use his badge to access the OHR secured area for a personal meeting unless he had an appointment. They also directed him to advise them in advance when he is assigned to work in the OHR secured area. On December 19, Mr. Hendrix summarized their meeting and confirmed by email for Appellant the Agency's requirement that he schedule an appointment with OHR staff to discuss personal matters, stating, "If you would like to request a meeting with an OHR employee you schedule it through the appropriate channels which would either be by phone or email. You are expected to comply with these directives and any deviation from them could be cause for disciplinary

action." (Ex 11-2). On December 23, Appellant responded by email with critical comments and denied that he had accessed the OHR area for personal use. (Ex. 11-1).

In the letter of discipline, Mr. Johnson stated, "[Mr. Branchaud] also explained that you should not access the secured area, and that you needed to make an appointment first." (Ex. 15-4,-5). However, Mr. Branchaud emailed Ms. Westendorp shortly after Appellant left the OHR secured area and stated, "I do request, however, that Mr. Bouzaida be advised that he must contact me in advance if he wishes to meet with Karen, just as any employee does, and cannot just 'stop by'". He did not state in his email or testify to having personally admonished Appellant. Mr. Branchaud also did not state a limitation that all employees must schedule any meeting with OHR staff by phone or email. He testified that employees routinely walk into the receptionist to request meetings with OHR staff, and the receptionist then directs them as appropriate.

### Graffiti

On December 18, 2019, the security staff at the Webb Building contacted Appellant at 1:30 a.m. as he was on duty, presumably for emergency calls, and advised him of the need to remove graffiti that had been placed on the Colfax entrance to the building. At 7:00 a.m., the staff again contacted Appellant to renew the request for removal of the graffiti. Appellant referred the staff to Mr. Hendrix, whose duties typically included the removal of graffiti. On December 19, Mr. Johnson and Mr. Hendrix asked Appellant why he had not removed this graffiti as its security staff had requested. In the letter of discipline, Mr. Johnson stated that Mr. Hendrix explained to Appellant that the removal was part of Appellant's responsibility and that "it was imperative that it was taken care of timely", which Appellant had disregarded. (Ex 15-5).

Appellant defended his actions by noting that Mr. Hendrix is responsible to remove graffiti. At hearing, Mr. Hendrix testified he did not expect Appellant to come to the Webb Building to remove graffiti at 1:30 a.m. Mr. Hendrix also agreed that his duties included the removal of graffiti at this building. Appellant testified that he prioritized a search for the source of a smell of gas in the Minoru Yasui building. He stated that he had smelled it before but could not locate the source. He stated that it was more critical to double check that issue now that the Building was open and more people were using it. Mr. Johnson testified that an MTS has the discretion to prioritize tasks, including a search for a gas leak. He stated he did not locate a report of a gas leak for that time in Infor, although he did not review the security logs.

### Appellant's Discrimination Claim

Appellant premised his national origin discrimination claim on Mr. Hendrix's August 2019 comment to him to the effect that if Appellant did not like his working conditions, he could leave the country, and on allegedly disparate treatment. Appellant had been grouching about how hard it is to get projects done in the City due to its budgeting process when Mr. Hendrix responded with his comment. Appellant testified that he was distressed by Mr. Hendrix's comment. Appellant was born in Morocco, immigrated to the U. S. in April 1999, and then became a United States citizen and started his family here. He earned a GED degree, a substitute for a high school diploma and has received some certification in building maintenance. Appellant requested that Mr. Johnson authorize mediation on Appellant's issues with Mr. Hendrix. Mr. Johnson denied this request as unproductive since he deemed Appellant to be the problem.

Appellant first raised Mr. Hendrix's exclusionary comment to him at his Contemplation of Discipline meeting. This was when Mr. Johnson learned of it and he questioned Mr. Hendrix about it. Mr. Hendrix conceded making the comment and stated that he understood that it could have been misconstrued. Mr. Johnson considered these concessions as Mr. Hendrix taking responsibility for his conduct. Mr. Johnson described his conversation with Mr. Hendrix as a counseling and also required him to attend a class on crucial communications, still pending.

On December 23, 2019, the Agency notified Appellant of potential discipline and placed him on administrative leave. (Ex. 12). On January 6, 2020, Appellant met with Mr. Johnson, Mr. Hendrix, and Amy Lowell, OHR Employee Relations Partner, for his Contemplation of Discipline meeting. Appellant intended to retain counsel but could not do so due to the preceding holidays. He did not appear to understand that he could have the meeting postponed to get counsel, indicating that he would continue with the meeting as he did not have time to get counsel.<sup>3</sup> Appellant read a statement in his defense. Mr. Johnson testified that Appellant did not appear remorseful or take responsibility for his actions. On January 24, 2020, the Agency demoted Appellant to a Building Engineer based on the reasons described in Mr. Johnson's Disciplinary Letter. (Ex. 15).

## IV. ANALYSIS

### A. Jurisdiction and Review

The Career Service Hearing Office has jurisdiction of this direct appeal of an involuntary demotion pursuant to CSR 19-20A.1.c. The Hearing Officer is required to conduct a *de novo* review, meaning to consider all of the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo.App. 1975); CSR 19-55 A.

### B. Burden and Standard of Proof

The Agency retains the burden of proof, by a preponderance of the evidence, throughout the case to prove that Appellant violated CSR 16-28 A, D, F, I, L, N, and T, and to prove that its discipline imposed on him was within a reasonable range of alternatives available to it. CSR 19-55 A.

### C. Authority

CSR 16-28 states in relevant part:

- A. Neglect of duty or carelessness in performance of duties and responsibilities.
- D. Any act of dishonesty, which may include, but is not limited to, lying, or improperly altering or falsifying records, examination answers, or work hours.
- F. Failing to comply with the lawful orders of an authorized supervisor or failing to do assigned work which the employee is capable of performing.
- I. Failure to maintain satisfactory working relationships with co-workers and other individuals the employee interacts with as part of his or her job.
- L. Discrimination or harassment as defined in this Rule 16. This includes making derogatory

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<sup>3</sup> The Hearing Officer does not consider this result a violation of due process as Appellant was able to address his response comprehensively at hearing.

statements based on race, color, creed, religion, national origin, sex, gender identity, sexual orientation, marital status, military status, age, disability, or political affiliation, or any status protected by federal, state, or local laws. This prohibited conduct need not rise to the level of a violation of any relevant state or federal law before an employee may be disciplined and the imposition of such discipline does not constitute an admission that the City violated any law.

- N. Unauthorized deviation from scheduled shift including reporting to work after the scheduled start time of the shift, leaving work before the end time of the shift, or working unauthorized overtime.
- T. Conduct which is or could foreseeably:
  - 1. Be prejudicial to the good order and effectiveness of the department or agency;...
  - 3. Be unbecoming of a City employee.

#### **D. Career Service Rule Violations**

##### 1. CSR 16-28 A – Neglect or Carelessness

Mr. Johnson testified that Appellant violated this Rule through his failure to enter his time into the Infor system, install a lock at the Minoru Yasui building, remove the graffiti at the Webb Building, and through his comments that Agency meetings are a waste of time. Appellant argued that he complied with his Infor duty sufficiently, Mr. Hendrix created the lock installation delay, and the building management had installed a lock anyway, Mr. Hendrix had the duty to remove the graffiti, and denied making comments about ignoring Agency meetings to a subordinate. The Hearing Officer finds that the Agency proved some violations of this Rule by Appellant.

Appellant was dutybound to follow Mr. Hendrix's directive that he input his time into the Infor system for the 1245 Champa building. Although Mr. Hendrix testified that he did not enforce this duty routinely for the MTS staff, including Appellant, and Mr. Hendrix was enforcing it specifically on Appellant due to his work on this building, Appellant had no basis to ignore the directive. Mr. Hendrix's claim that the Agency needed Appellant's time to bill its building tenants lacked credibility, but it did not discipline him for a loss of funds due to inadequate billing.

Appellant was dutybound to follow Mr. Hendrix's directive to install a lock at the Minoru Yasui building, even if did not install it personally. Even if Mr. Hendrix had not yet selected a specific type of lock, Appellant should have installed one to address the tenants' concerns. If Mr. Hendrix later chose a different lock, Appellant could have exchanged it. He instead did not install a lock as a reaction to Mr. Hendrix, causing the tenants to have to install their own lock.

Appellant violated his duty to attend the Agency meetings and to encourage other employees to also attend them. His testimony showed that he viewed meetings as expendable. There is no reason why he would have told the subordinate who also missed a meeting anything different from his assessment of them. So, his denial is not credible.

The Agency did not prove Appellant violated a duty to remove the graffiti at the Webb building. Mr. Hendrix's testimony showed otherwise. He testified that he had this duty and that he did not expect Appellant to come in at 1:30 a.m. to remove it, evidently because the graffiti was not an emergency. Once they both came to work in the morning, Mr. Hendrix's duty to remove it applied. The evidence did not show that the Agency duties are rearranged because a particular entity called in a complaint. But Mr. Johnson stated in the Disciplinary Letter that the graffiti

“should have been cleaned up immediately, especially since security was requesting it.” Mr. Hendrix’s testimony did not bear out any duty to remove it immediately. If the fact that security requested the removal elevated its priority, Mr. Hendrix should have removed it promptly upon his arrival at work, but he delegated the task to someone else.

## 2. CSR 16-28 D - Dishonesty

Mr. Johnson testified that Appellant violated this Rule through his failure to appear at work at 7:00 on the day of his DIA interview as agreed, denial of his November 18 comment about Moroccan superiority, claim that he had an interview with Ms. Niparko on December 18 when he accessed the OHR secured area, and claim that he checked for a gas leak instead of removing the graffiti at the Webb Building. Appellant argued that he did intend to arrive at work at 7:00 on the day of his interview but was expedited by DIA, denied making any comment about Moroccan superiority, denied he claimed to have had a meeting with Ms. Niparko, and stated he checked for a gas leak rather than remove the graffiti on the Webb Building. The Hearing Officer finds that the Agency proved some violations of this Rule by Appellant.

The Hearing Officer finds that Appellant did state that Moroccans are more intelligent than Americans and communicate better. Mr. Hendrix had earlier made his anti-immigrant comment to Appellant. As a supervisor, he set the example that someone who is annoyed may make divisive comments. Appellant was by then frustrated with his lack of success in getting promoted. He had not been promoted in June 2019, and Mr. Johnson later advised him that he would not get interviewed for the superintendent position for which he had then applied. In addition, Appellant perceived flaws he deemed apparent in the Agency management. So, he expressed his dissatisfaction broadly. His denial is unconvincing, and he violated this Rule through this comment, and then denying having said that comment.

Appellant intended to come to work at 7:00 a.m. on November 15, and then leave to interview at DIA. However, he was advised to come into DIA earlier. He concluded that he would not have meaningful time at work before having to leave so he did not come in at 7:00 a.m. That he did so does not convert his earlier intent to do so as into an act of dishonesty or a violation.

In his Disciplinary Letter, Mr. Johnson stated, “You stated [to Mr. Hendrix and Mr. Johnson] you did have a previously scheduled appointment with Ms. Niparko on December 18, 2019. OHR verified with Mr. Branchaud that this was not true.” Mr. Hendrix testified to this claim. However, Mr. Hendrix’s email summarizing their meeting following that incident makes no mention of it, in spite of its alleged significance. (Ex. 11). Appellant neither made this claim in his email responses or in his testimony. Mr. Johnson stated he did not recall if Appellant had an appointment. Mr. Branchaud did not testify to any query from the Agency asking to confirm that Appellant had no appointment. The Hearing Officer finds that the Agency failed to prove this claim.

The Hearing Officer has reviewed Mr. Johnson’s Disciplinary Letter and does not find that the Agency disciplined Appellant for allegedly lying about investigating a gas leak. As such, and since the Agency cannot justify Appellant’s discipline with new allegations, the Hearing Officer does not analyze this allegation further.

### 3. CSR 16-28 F – Failure to Comply or Do Work

Mr. Johnson testified that Appellant violated this Rule through his failures to enter his time into the Infor system, install the lock at the Minoru Yasui building, remove the graffiti at the Webb Building, and his comment that Agency meetings are a waste of time. Appellant argued that he complied with his Infor duty sufficiently, Mr. Hendrix created the lock installation delay, and the management had installed a lock anyway, Mr. Hendrix had the duty to remove the graffiti, and he denied making the comment about Agency meetings. The Hearing Officer finds that the Agency proved some violations of this Rule by Appellant.

For the reasons described above regarding CSR 16-28 A, Appellant violated this Rule by failing to execute his duties to follow Mr. Hendrix's directives that he enter some of his time into the Infor system, install a lock in the Minoru Yasui building, and to attend Agency meetings and encourage other employees to also attend them.

For the reasons described above regarding CSR 16-28 A, Appellant had no duty to remove the graffiti at the Webb Building under the circumstances and thus committed no violation of this Rule for not doing so.

### 4. CSR 16-28 I – Failure to Maintain Satisfactory Relationships

Mr. Johnson testified that Appellant violated this Rule through his untoward emails, his failure to appear at 7:00 am on the day of his DIA interview, his comment about Moroccan superiority over Americans, and his email to Ms. Niparko about Ms. Westendorp. Appellant argued his emails are acceptable and are merely composed in plain English, his failure to appear at 7:00 a.m. the day of his interview was a minimal issue under the circumstances, denied his comment about Moroccan superiority, and explained his email about Ms. Westendorp as factual. The Hearing Officer finds that the Agency proved some violations of this Rule by Appellant.

Appellant's emails have some issues due to their content, but they are not as clearly violative as the Agency claims. Appellant's continued disagreement with the Agency's hiring of Mr. Hedrick is problematic for his persistence. While he can voice input even to disagree, once the Agency makes a decision, it is binding on him and his duty is to implement it to the best of his ability. His continued criticism is distracting and a violation of the Rule.

However, Appellant alleged that Mr. Hendrix created the LBE for Mr. Hedrick, and some facts can be construed to give that impression. First, Appellant stated that he is responsible for hiring the LBE as his subordinate, but Mr. Hendrix appeared to make the hiring decision, with support from Mr. Johnson. Inexplicably, Mr. Hendrix did not take input from Appellant on the creation of the LBE position or advise him that the position was open. Appellant learned of it when he saw it posted. Mr. Botia then emailed Mr. Hendrix that he would then post the position so his candidate [Mr. Hedrick] could now apply for it. Candidate Mr. Navarro could not interview because he had mandatory snow removal duty, but Mr. Johnson and Mr. Hendrix denied Appellant's request to reschedule his interview. Mr. Hendrix testified that Mr. Navarro's absence evidenced that he had no interest in the position, even though he had just applied for it. Mr. Johnson's Disciplinary Letter states that the Agency created the position "as a promotional opportunity within" the City. The Agency would best boost its employee morale if it hired from within the Agency. These facts favored Mr. Hedrick and he got the position as Appellant predicted. So, Mr. Hendrix, albeit with Mr. Johnson's support, did Mr. Hedrick a

disservice even if he was the best qualified candidate by appearing to favor his hiring. And the Agency then disciplined Appellant for his criticism that it cannot prove as unwarranted given these facts. Appellant's criticism itself is not a violation of this Rule.

On October 30, 2019, Appellant accused Mr. Hendrix of engaging in a virtual political campaign and requested that he cease the "interference." Appellant complained that Mr. Hendrix would direct the operations of his subordinates but exclude him from those decisions. Mr. Hendrix did solicit comments from Appellant's subordinates if they felt Appellant supported them inadequately. He largely excluded Appellant from the implementation of the LBE position. He also authorized time off for Appellant's subordinate to interview without informing Appellant. Appellant's allegation of a political campaign is misplaced. However, his claim that the chain of command should be observed is valid. The Hearing Officer finds this to be a minor violation.

On November 5, 2019, Appellant stated that Mr. Hendrix alleged that Appellant felt threatened by Mr. Hendrix because Appellant had criticized his hiring. Appellant described Mr. Hendrix's "comments" as "a testimony to his bias and ignorance". Appellant's allegation of the ignorance of Mr. Hendrix is unfounded. Mr. Hendrix had worked with Appellant and the members of Appellant's team for several years. To claim he is unaware of their backgrounds or talents is not credible and merely an excuse to discredit his communications. This comment is a violation of this Rule.

However, Appellant leveled the allegation of the bias of Mr. Hendrix after he invited Appellant to leave the country due to his prior criticisms. This comment alone evidences bias. Some immigrants<sup>4</sup> experience comments upon complaining of conditions here to the effect that they are inferior and they should return to their inferior country if they do not like it here. Herein, Mr. Hendrix took offense at Appellant's prior criticisms of the U.S. and the President. He described himself as "concerned", "bothered", and "disturbed" by them. But Appellant is a citizen with a right to his opinions without jeopardizing his presence. The Agency focused on the fact that Mr. Hendrix did not invite Appellant to return to Morocco. However, Mr. Hendrix knew that Appellant was a Moroccan immigrant when he invited Appellant to leave the U.S. Immigrants from a first world country are rarely invited to return, say to England, or France, or Germany, because it is not an insult. That is, they are not being denigrated by being told to return to their prior, inferior residence. So, an invitation or directive that an immigrant leave the U.S. or return elsewhere is a disparate treatment, whether intentional or unconscious. Thus, Appellant's claim of bias by Mr. Hendrix has a basis and is not a violation of this Rule.

For the reasons described above regarding CSR 16-28 D, Appellant violated this Rule with his comment regarding Moroccan superiority.

In part for the reasons described above regarding CSR 16-28 D, Appellant did not violate this Rule by failing to appear at 7:00 a.m. on the day of his DIA interview. Also, the City's policy facilitates such interviews. Had Appellant not accommodated the hiring authority, he could have been subject to a claim similar to Mr. Hendrix's, that he had no interest in the job. The Agency should have accommodated Appellant's interview rather than discipline him for it.

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<sup>4</sup> Some U.S. born citizens also experience these comments if they have Hispanic surnames, for example, or evidence ethnic culture. A common comment is, "Go back to Mexico."

Appellant emailed Ms. Niparko an invitation to a meeting 14 minutes before it began. As everyone should have expected, she did not attend. Ms. Niparko has significant and substantial duties, and they do not include personally monitoring a subordinate like Ms. Westendorp. The Agency disciplined Appellant not because he sent this untimely email to Ms. Niparko, but because he criticized Ms. Westendorp as not neutral, when “[she] has been nothing but professional towards you.” (Ex. 15-4). At hearing, the Agency did not address Ms. Westendorp’s impartiality towards Appellant. More importantly, there was no evidence that any working relationships were impaired. OHR staff deal with employment disputes regularly and they must expect that some individuals will be dissatisfied with their outcome. Appellant testified that Ms. Westendorp’s protocol shows that she is not neutral. To receive his complaint about his superiors, she would convene a meeting with them present. They sat on one side and he on the other. After the meeting, they would remain, presumably to consult about him. These optics could give the impression that she is oriented towards management. Ms. Westendorp may have sound reasons for this protocol which the Agency or she could have explained to him. Regardless, the Hearing Officer does not find a violation of this Rule due to this criticism.

5. CSR 16-28 L - Discrimination

Mr. Johnson testified that Appellant violated this Rule through his comment about Moroccan superiority over Americans. Appellant denied this allegation.

For the reasons described above regarding CSR 16-28 A, Appellant violated this Rule through his patently discriminatory comment.

6. CSR 16-28 N – Unauthorized Deviation from Shift

Mr. Johnson testified that Appellant violated this Rule through his failure to report to work at 7:00 on the day of his DIA interview and by deviating from his work responsibilities to access the OHR secured area for personal reasons. Appellant argued that his late arrival was minimal and that he did not access the OHR for personal reasons.

For the reasons described above regarding CSR 16-28 I, Appellant did not violate this Rule by failing to appear at 7:00 a.m. on the day of his DIA interview.

Appellant did access the OHR secured area for personal reasons. He defines “personal” to mean a discussion of personal matters and stated that he did not discuss them with anyone at OHR, hence he did not access the area for personal reasons. This argument lacks merit. However, Appellant’s intrusion into his work responsibilities was minimal, one minute in the OHR secured area plus whatever time he took to enter it. The Agency did not identify Appellant’s floating lunch hour, that Mr. Johnson described, of this day or whether he was on it then. When Appellant accessed the OHR area for personal reasons, the Agency had not imposed limitations on his access to it. Even after his intrusion, it only required him to make an appointment before accessing OHR but not to seek a supervisor’s approval to include it in his schedule. Although the Agency purported to not otherwise limit Appellant’s access to OHR, it disciplined him for this additional limitation. The Hearing Officer finds that the Agency did not prove Appellant violated this Rule.

7. CSR 16-28 T, Conduct, Section – Prejudicial, and 3 - Unbecoming

Mr. Johnson testified that Appellant violated Section 1 of this Rule through his untoward emails, failure to install the lock at the Minoru Yasui building, comment about Moroccan superiority, comment that meetings are a waste of time, email regarding Ms. Westendorp, and

failure to remove the graffiti at the Webb building. He also testified that Appellant violated Section 3 of this Rule through his failure to input his time into the Infor system and his criticism of Ms. Westendorp. Appellant argued that his emails are acceptable and merely composed in plain English, Mr. Hendrix created the lock installation delay, and the building custodian had installed a lock anyway, denied his comment about Moroccan superiority, denied his comment about Agency meetings, and explained his email about Ms. Westendorp as factual; and that he complied with his Infor duty sufficiently. The Hearing Officer finds that the Agency proved some violations of this Rule by Appellant.

For the reasons described above regarding CSR 16-28 I, Appellant violated Section 1 of this Rule through his emails criticizing Mr. Hendrix as ignorant and engaged in a virtual political campaign, and his extended criticism of the Agency's hiring process for its LBE.

For the reasons described above regarding CSR 16-28 A, Appellant violated Section 1 of this Rule through his failure to install a lock at the Minoru Yasui building and his comment that Agency meetings are a waste of time.

For the reasons described above regarding CSR 16-28 D, Appellant violated Section 1 of this Rule with his comment regarding Moroccan superiority.

For the reasons described above regarding CSR 16-28 I, Appellant did not violate this Rule through his email criticizing Ms. Westendorp.

For the reasons described above regarding CSR 16-28 A, Appellant did not violate this Rule through his failure to remove graffiti at the Webb Building.

For the reasons described above regarding CSR 16-28 A, Appellant violated Section 3 of this Rule through his failure to input his time into the Infor system.

#### **E. Appellant's Discrimination Claim**

The evidence does not show that Appellant was disciplined based on his national origin. The Agency, through Mr. Johnson, disciplined Appellant for the allegations against him, some sustained and others not, in its Disciplinary Letter. Mr. Hendrix did make an anti-immigrant comment to Appellant, but it did not generate the Agency's discipline of him. Mr. Johnson decided Appellant's discipline and he had not even been aware of Mr. Hendrix's comment until the latter part of the disciplinary process. Mr. Johnson took no part in Mr. Hendrix's comment. Thus, Appellant's nationality was a not contributing or motivating factor in the Agency's discipline of him. [In re Koonce](#), CSB 36-13A (10/16/14); see also [In re Wehmhoefer](#), CSA 02-08, 4 (Order 2/14/08), citing [In re Hurdelbrink](#), CSA 109-04 & 119-04, 8 (1/5/05). Appellant failed to prove this claim.

#### **V. DEGREE OF DISCIPLINE**

The Agency claimed that its discipline is appropriate, given Appellant's violations and his inability to continue to serve in a leadership position. Appellant argued that no discipline is appropriate since he did not commit any CSR violation, or it was unlawfully motivated by national origin discrimination. In the alternative, he argued that, should the Hearing Officer sustain the Agency's claim of his violation, its discipline of him therefor was excessive.

CSR 16-41 Purpose of Discipline states:

The purpose of discipline is to correct inappropriate behavior or performance, if possible. The type and severity of discipline depends on the gravity of the offense. The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record. The appointing authority shall impose the type and amount of discipline he or she believes is needed to correct the situation and achieve the desired behavior or performance.

### **1. Seriousness of the proven offense**

Appellant's misconduct is serious in that it was disruptive, disrespectful, unproductive and it was improper conduct by one in a supervisory position. His ongoing emails criticizing the Agency's LBE process became disruptive. His comments that Mr. Hendrix was ignorant and on a perpetual political campaign, and of Moroccan superiority were disrespectful. Appellant improperly disregarded directives to input his time into the Infor system promptly, to install a lock at the Minoru Yasui building, and to attend and promote Agency meetings. On the other hand, the damage to the Agency is limited. No damage occurred to the Minoru Yasui building due to the lock delay. The Agency did not lose reimbursements from Appellant's dilatory entry of time into the Infor system. Appellant has ceased his critical emails. Mr. Johnson and Mr. Hendrix have finally made their point to Appellant about them, although over too long of a time. Mr. Hendrix's and Appellant's untoward comments were limited to each other and have not been repeated. Appellant has been late only once in his career, and he now knows to attend Agency meetings.

### **2. Prior Record**

On September 19, 2019, the Agency issued a Written Reprimand to Appellant for improper Behavior.

### **3. Likelihood of Reform**

Appellant has a high likelihood of reform. Certainly, he has not accessed the OHR secured area for personal reasons in disregard of the Agency's prohibition. He appeared to have the impression that he could grouse continually over not getting promoted, even though he expressed his displeasure through criticism of other Agency operations. He did not appear to expect discipline for his ongoing criticism of it, albeit some criticism could have been warranted, and perhaps believed he might only receive another Written Reprimand. Having been demoted, Appellant now realizes that he needs to move beyond his failed efforts at promotion and to promptly execute the directives of his supervisors.

## **VI. CONCLUSION AND ORDER**

Within the Agency, Appellant's violations do not warrant a double-level demotion from Multiple Trades Supervisor to Building Engineer, as he can function as a supervisor. His core issues were his disappointment at not getting promoted and his personal conflict with Mr. Hendrix. Yet his manifestation of these issues is not as serious as the Agency alleged in its Disciplinary Letter. It disciplined him for his criticism of the LBE rollout, which it could not prove was unwarranted. It overreacted to Appellant's delay at work when he interviewed for a City position, available under

the City's policy on interviews. It overreacted to Appellant's criticism of Ms. Westendorp. It retroactively imposed a duty on him to get an approved modification to his schedule to access OHR. On an ad hoc basis, it tried to hold him responsible for Mr. Hendrix's duty to clean the graffiti at the Webb Building. And it also disciplined Appellant for having falsely stated that he had an appointment with Ms. Niparko, which the evidence did not support.

The Agency also mishandled its management of Appellant to an extent. It did not adequately include him in its rollout of the LBE position, his immediate subordinate. It rejected Appellant's request for a mediation of his conflict with Mr. Hendrix, predetermining Appellant as the problem. It thus left itself ignorant of Mr. Hendrix's anti-immigrant comment, which a mediation would have uncovered and left their conflict unresolved. In contrast to its reaction to Appellant's delay, it accommodated a City interview by Appellant's subordinate without affording Appellant a courtesy notice. While comparative discipline is inapplicable, the Agency issued Appellant a Written Reprimand in 2109 for untoward comments yet only counseled and required a class of Mr. Hendrix,<sup>5</sup> a higher-level employee, for similar conduct. Not surprisingly, Appellant was unhappy at the job.

Mr. Johnson stated in the Disciplinary Letter that Appellant "should not be in a leadership position" but did not actually consider Appellant unable to staff a leadership position, even under the original allegations for Appellant's discipline. He testified that he could have demoted Appellant to LBE, a single-level demotion, but did not have any open positions. An LBE would still be a leadership position, albeit only when the MTS is absent. Yet several of the Agency allegations against Appellant were unfounded or it misapplied the CSRs against him. Appellant's violations generally regard his issues and criticisms with his superiors, not his leadership of his subordinates. At times, the Agency rejected Appellant's criticisms without understanding their basis. Appellant did not create the lack of an open LBE position, and it is not a basis on which he should be demoted beneath it. In addition, the Agency ignored efforts to reform Appellant, including going to mediation or requiring him to get education on email communication skills.<sup>6</sup> His record in 7 years is a Written Reprimand that the Agency could have handled differently, similar to Mr. Hendrix's issue. Under the circumstances, Appellant should be disciplined but the Agency lacks an adequate basis under the established CSR violations and their lack of severity, to demote him.

The Agency's demotion of Appellant did not comport with CSR 16-41, as it exceeded what was necessary to address his inappropriate behavior, and was not reasonably related to the seriousness of his conduct; and as the record did not reflect a sufficient, reasonable, and articulated justification for it, thus it was outside the range of alternatives available to a reasonable and prudent administrator, and it was clearly excessive. See [In re Economakos](#), CSB 28-13A, 2 (3/24/14), *citing* [Adkins v. Division of Youth Services, Dept. of Institutions](#), 720 P.2d 626 (Colo.App. 1986); [Colorado Dept. of Human Services v. Maggard](#), 248 P.3d 708 (Colo. 2011).

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<sup>5</sup> Mr. Hendrix supposedly took responsibility for his action. Rather, he transferred blame to Appellant for misconstruing his comment, but for which he considered it acceptable. The Agency asked Appellant in detail whether he apologized for his emails, but Mr. Hendrix evidently never apologized to Appellant either.

<sup>6</sup> Training on communication by email is available to attorneys as continuing legal education, as it is deemed to require a more specific syntax.

The Hearing Office and the Career Service Board “take the concept of progressive discipline seriously,” and it would be error to fail “properly consider and implement progressive discipline” in a case such as this where it is appropriate. [In re Ford](#), CSB 48-14A, 9 (12/17/15).

Accordingly, the Hearing Officer modifies the Agency’s demotion of Appellant to a Temporary Reduction In Pay of 10% for five pay periods.

DONE September 11, 2020.



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Federico C. Alvarez  
Career Service Hearing Officer

### **NOTICE OF RIGHT TO FILE PETITION FOR REVIEW**

You may petition the Career Service Board for review of this final order, in accordance with the requirements and limitations of CSR § 21-20 et seq., within fourteen calendar days after the date of mailing of the Hearing Officer’s decision, as stated in the certificate of delivery, below. See Career Service Rules at [www.denvergov.org/csa](http://www.denvergov.org/csa). All petitions for review must be filed with the:

#### **Career Service Board**

c/o OHR Executive Director's Office  
201 W. Colfax Avenue, Dept. 412, 4th Floor  
Denver, CO 80202  
FAX: 720-913-5720  
EMAIL: [CareerServiceBoardAppeals@denvergov.org](mailto:CareerServiceBoardAppeals@denvergov.org)

#### **Career Service Hearing Office**

201 W. Colfax, Dept. 412, 1st Floor  
Denver, CO 80202  
FAX: 720-913-5995  
EMAIL: [CSAHearings@denvergov.org](mailto:CSAHearings@denvergov.org).

**AND** opposing parties or their representatives, if any.