

DECISION AFFIRMING DISMISSAL

TED CHRISTIANSON, Appellant,

v.

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

I. INTRODUCTION

Appellant appeals the termination of his employment from the Agency. A hearing concerning the appeal was conducted by Bruce A. Plotkin, Hearing Officer, on July 20, 2018. Assistant City Attorneys Kristen Merrick and Rachelle Hill represented the Agency. Nathan Chambers, Esq., represented Appellant. Agency exhibits 1-3, and 7-14 were admitted. Appellant stipulated to the authenticity and foundation for the remainder of Agency exhibits 4-6. Appellant's exhibits A, N-P and R were admitted, and the Agency stipulated to the foundation for the remainder of Appellant exhibits B-M, Q, and S-DD. During hearing, the Agency withdrew its claims under CSR 16-29 T.1. and T.2, leaving intact its claims under CSR 16-29 T.3.

II. ISSUES

The following issues were presented for appeal:

- A. Whether the Appellant violated Career Service Rules (CSR) 16-29 J, R, or T.
- B. If Appellant violated one or more of the aforementioned CSRs, whether the Agency's choice of discipline conformed to the purposes of discipline under CSR 16-41.

III. FINDINGS

The Appellant, Ted Christianson, was a 17-year Career Service employee in the Department of Public Works, beginning in 2001. At the time of his dismissal, he attained a director-level position, Director of Right of Way Services. As a director, Christianson was one of the highest-ranking employees in the Department of Public Works. He testified before the Denver City Council, met with officials from other agencies, conducted appeals, met with outside contractor officials, and otherwise represented the City in his official capacity. Senior-level supervisors such as Christianson are responsible for modeling behavior, holding accountable, and enforcing good behavior in their subordinates. Christianson held supervisory authority, directly and indirectly, over

170-240 subordinates. [Christianson testimony; Cleckley testimony]. Prior to the incident underlying this appeal, he had no prior discipline and his annual work reviews were exemplary.

On October 15, 2017, Christianson attended a Denver Broncos football game at Mile High Stadium. Two stadium employees, Julie Avila and Nia Cisneros, were on a break outside the stadium when Christianson, who had just been ejected from the stadium, approached them. Without saying a word, he sat so close to them as to cause them concern. He asked if they were married and described his wife in vile language. The women were polite, but declined to engage with him other than telling him "enjoy the game" and "goodnight." Christianson smelled strongly of alcohol, slurred his words, walked unsteadily, and otherwise appeared alcohol-intoxicated. [Cisneros testimony; Avila testimony; Torsney testimony]. The women walked away. Christianson, who was already outside when the two employees were walking back to their stations, approached them again, making faces and waving his hands. [Cisneros testimony; Avila testimony]. This second encounter was captured on the stadium's security camera. [Exh. 1].¹

Without warning or provocation, Christianson struck Avila in the throat with a closed fist, snapping her head back, and knocking her to the ground. [Exh. 1 at 7:57:25; Avila testimony]. He backed away momentarily, put his hands up and danced like a boxer. He ran toward Cisneros who ran behind Avila to avoid him. Christianson swung at Cisneros, but missed, fell on top of Avila, and punched her in the head. [Exh. 1 at 7:57:31; Exh. 8-5, 8-6, 8-11, 8-12, 8-16, 8-17; Exh. 7 at 2:03-2:13; Avila testimony]. Two bystanders immediately ran to assist, and pulled Christianson off Avila. Avila suffered pain in her throat, head and back. She continued to have throat pain and difficulty speaking for several months. Both she and Cisneros were afraid of Christianson, and both were highly distressed by the incident. [Exh. 7; 8-11; 8-12; 8-16 through 8-19; Avila testimony; Cisneros testimony]. When Denver Police officers helped Christianson to his feet, he was unsteady and several times said "whoa." [Exh. 1; Exh. 2].

Christianson was arrested and charged with assault and disturbing the peace under the Denver Revised Municipal Code.² Following a plea bargain, the assault charge was dismissed and Christianson pled guilty to disturbing the peace. Christianson first reported he had one beer before the Broncos game. [Exh. 11-3; Davies testimony]. Later he indicated he bought a gin and tonic at the game. [Exhs. 10; 11-3]. At his contemplation of discipline meeting, he only referenced having a [one] "drink" at the game. [Exh. 11-4]. At hearing and at his medical evaluation, Christianson amended his recollection to reveal he may also have consumed two beers, homemade wine, and two or three gin and tonics³ between four and six p.m. before and during the October 15, 2017 Broncos game. [Christianson testimony; Appeal attachment].

¹ In Exhibit 1, Christianson, in a green jacket, enters the scene from the bottom at 7:56:37; Avila and Cisneros enter the scene together at 7:56:46 with Avila on the left and Cisneros on the right; Christianson grabs Cisneros with his left arm and begins to take a swing at Avila at 7:57:25, striking her in the same second.

² DRMC 38-93 and 38-89 respectively.

³ Christianson denied drinking a third gin and tonic, but when pressed, acknowledged he drank some part of it, then, when pressed again, did not recall if he finished the third one. [Christianson testimony].

A contemplation of discipline meeting was convened on February 16, 2018. Christianson stated he was seeking medical confirmation of his belief the October 15 incident derived from a medical condition, although the contemplation meeting was four months after the incident and he had not yet provided any such medical confirmation.⁴

The Agency served Appellant with a notice of discipline, dismissing him from employment on March 7, 2018. This appeal followed timely on March 19, 2018.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR § 19-20 A.1.a. as the direct appeal of a dismissal. 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); CSR 19-55 A.

B. Burden and Standard of Proof

The Agency retains the burden of persuasion to prove Christianson violated one or more cited sections of the Career Service Rules, and to prove its decision to dismiss him complied with CSR 16-41. The standard by which the Agency must prove its claims is a by a preponderance of the evidence. CSR 19-55 A.

C. Career Service Rule Violations

1. 16-29 J. Being charged with or convicted of a crime.

Christianson acknowledged he was charged with assault and disturbing the peace under the Denver Revised Municipal Code. [Christianson testimony]. He also acknowledged he pled guilty to disturbing the peace under DRMC 38-89. [*Id.*]. Those acknowledgements establish a violation of this rule. [See also Exh. 8].

2. CSR 16-29 R. Conduct which violates... the Denver Revised Municipal Code, Executive Orders...

As it pertains to:

i. DRMC 38-93 ASSAULT

Under this Denver law, “[i]t is unlawful for any person to intentionally or recklessly assault, beat, strike, fight or inflict violence on any other person.”

⁴ Before hearing, Christianson offered the testimony and report of a forensic psychiatrist. Both were denied for reasons stated in the “Order Denying Appellant’s Unopposed Subpoena Request” on June 4, 2018.

Christianson admitted he struck Avila. He did not contest the elements of “intentionally or recklessly.” To that end, the video and testimonial record established Christianson intended to and did strike Avila.

Christianson claimed a medical condition was the cause of his blackout during which he struck Avila. If this was intended as an affirmative defense to the “knowing” and “reckless” elements of assault, Christianson did not claim it as such. Even if intended as such, Christianson’s alleged proof consisted of unsubstantiated, various medical conditions which might or might not be associated with blacking out. He offered as possible medical explanations for his actions: dehydration, epileptic seizure; hallucinations; elevated heart rate; brain tumor; and methanol poisoning. Christianson’s evidence did not include a medical diagnosis of any of those conditions,⁵ and his evidence did not indicate a connection between those medical conditions and his assaultive behavior. In the absence of such a nexus, the visual and testimonial evidence establish Christianson struck Avila intentionally on October 14, 2017, in violation of DRMC 38-93.

ii. DRMC 38-89 DISTURBING THE PEACE

Under this law, “[i]t is unlawful for any person to disturb or tend to disturb the peace of others by violent, tumultuous, offensive or obstreperous conduct...”

Much of the same conduct which established a violation of the assault ordinance also established a violation of this law as well. The video and testimonial evidence established Christianson’s striking Avila was violent, tumultuous, offensive, and obstreperous to her, in violation of DRMC 38-89. His attempting to grab Cisneros and strike her was also violent, tumultuous, offensive and obstreperous in violation of DRMC 38-89.

iii. E.O. 112 VIOLENCE IN THE WORKPLACE

2.0 Policy: Violence... whether on duty or off-duty...is strictly prohibited.

3.0 Definitions: Violence is defined, but not limited to... (a) the actual or attempted: physical assault...

Any violation of this policy may result in... dismissal

Christianson admitted he violated this rule in striking Avila. [Christianson testimony]. This violation is established. The remainder of Christianson’s evidence concerning this rule violation related only to the degree of discipline assessed, and not to the rule violations.

⁵ Even the report of a forensic psychiatrist, offered and rejected before hearing, offered no medical conclusion, but only myriad possible explanations for Christianson’s behaviors on October 15, 2017.

3. **CSR 16-29 I. Conduct which is or could foreseeably...3. Be unbecoming of a City employee**

Christianson acknowledged his actions on October 15, 2017 violated part 3 of this rule. [Christianson testimony]. This violation is established by admission.

V. DEGREE OF DISCIPLINE

A. Seriousness of the proven offenses

The decision-maker, Executive Director Eulois Cleckley based his decision to terminate Christianson's employment on the severity of injury Christianson caused in assaulting a member of the public, his leadership position, the Agency's intolerance of violence, and Christianson's lack of accountability for his actions, particularly as that consideration related to Christianson's leadership role. [Cleckley testimony]. Cleckley considered Christianson's otherwise unblemished record.

Christianson speculated he suffered from one or more medical conditions at the time he assaulted Avila and Cisneros. The evidence was more convincing that, at the time he struck Avila and attempted to strike Cisneros, Christianson was drunk and not suffering from a medical condition, based on the following evidence.

(1) Denver Police Officer Torsney was working security at the Broncos game on October 15, 2017. He testified without rebuttal that he is experienced in observing alcohol intoxication and non-alcoholic seizures. He observed Christianson shortly after Christianson attacked Avila and Cisneros. Nothing indicated to him that Christianson's actions were anything other than alcohol intoxication.

(2) Christianson acknowledged that, before he struck Avila, he drank two beers, an unspecified amount and strength of homemade wine, and two or three gin and tonics, all within two hours. [Christianson testimony].

(3) Christianson's evolving recollection of how much he drank raised doubt about his credibility. He initially reported having one beer. [Davies testimony].⁶ He told the doctor investigating his claim of having a seizure that he had consumed one glass of wine with dinner. [Christianson testimony]. At hearing, Christianson acknowledged having two beers, homemade wine, and up to three gin and tonics within a two-hour span before and during the Broncos game. Also at hearing, he testified he had less than one half of the third gin and tonic until pressed, at which point he acknowledged he did not remember how much of the third gin and tonic he consumed.

(4) An MRI found no evidence of a condition which could explain Christianson's behavior on October 15, 2017. [Christianson testimony; Exh. 12; Exh. 13-2; Exh. 14-3].

⁶ Christianson denied that, when he first reported the incident to Davies, he said he had one beer, rather that he had one drink in the stadium and that he tailgated before the game. Either way, his representation departs from his subsequent reporting of his alcohol consumption on 10/15/17, and he provided no reason to doubt Davies' recollection while, for reasons stated elsewhere, Christianson's credibility was suspect.

(5) During hearing, some nine months after the incident, Christianson still had no evidence, outside of speculation, that his assaultive behavior was likely caused by a medical condition. [Christianson testimony] despite seeing “multiple doctors [and a] mental specialist.” [Christianson cross-exam 10:40:27].

(6) Cisneros recalled Christianson was “zig-zagging” as he approached her and Avila, referred to his wife as a ‘ho, a whore, and a cunt.” Avila confirmed Christianson badmouthed his wife. [Avila testimony]. Cisneros was sufficiently traumatized by the incident that she stopped working at the stadium after the incident, stating “my life wasn’t safe working there.” [Cisneros testimony].

(7) Avila recalled Christianson would have sat on her if she hadn’t moved; he slurred his words and appeared intoxicated.

(8) Christianson was ejected from the stadium before his encounter with Avila and Cisneros. [Avila testimony; Davies testimony]. The explicit reason was not in evidence; however, I assume it was not for good behavior, and it is consistent with the remainder of the excess-alcohol evidence.

The Agency claimed Christianson failed to contact Avila to apologize to her, but after the incident he was under a no-contact order. Thus, I disregard this claim toward the seriousness of the violations.

Christianson argued his penalty was unfair when compared with similarly-situated employees who were not terminated in other disciplinary cases involving violations of EO 112. [Exhs. N; O; P; R]. First, discipline is not determined on a comparative basis under the Career Service Rules. [In re Ford, CSB 48-14A, 4 (12/17/15); see also In re Barra, CSB 01-16A, 3 (8/3/17)]. Second, I find the referenced appeals are not sufficiently similar to evoke unfairness in this discipline. In the referenced appeals, the appellants were not in management-level positions, meaning they were not subject to heightened responsibility for setting an example, no physical harm resulted requiring hospitalization of a victim, and no criminal charges were filed based on the appellants’ conduct.

B. Prior Record

The Agency acknowledged Christianson’s record was exemplary. Since his first annual work review in 2002, supervisors have graded Christianson’s work performance at or near the highest levels. [Exh. A-13 through A-19; A-46 through A-55; A-57 through A-60; A-61 through A-65; A-67 through A-75; A-76 through A-85; A-88 through A-105; A-108 through A-128; A-130 through A-152; A-153 through A-158; A-162 through A-167; A-185 through A-189; A-191 through A-195; A-196 through A-200; A-209 through A-212]. While the decision-maker, Executive Director Eulois Cleckley, considered this exemplary work history, he determined Christianson’s conduct, his lack of contrition, and the severity of injuries he caused, outweighed that history. The Career Service Rules do not require progressive discipline, only a balancing of severity of conduct, past record, and likelihood of reform in arriving at an outcome which is available to a reasonable and

prudent administrator. [CSR 16-41; 16-42 A.; In re Quezada, CSA 40-12, 9 (4/5/13), citing In re Garcia, CSA 175-04, 8 (7/12/05); In re Redacted, CSB 67-11A (4/4/13)].

C. Likelihood of Reform

From his initial report through hearing, Christianson denied he was alcohol-intoxicated when he assaulted Avila. He continued to offer varied, unconfirmed medical explanations, including (1) at his pre-disciplinary meeting, where Christianson stated he believed dehydration was the primary reason behind his actions on October 15, 2017. [Exh. 10 at 3:16, 7:57]. (2) Less than two minutes later he stated, "some sort of medical condition" was the cause of his actions, [*Id* at 4:40, 5:12]. [*Id* at 5:16]. (3) He opined his memory of the event was poor because blood pressure to his brain dropped when he stood. [*Id* at 12:06]. (4) He stated he may have had kidney trouble, [*Id* at 14:05, 14:40], evidenced by extreme chills two days later [*Id* at 14:54]. (5) He also told Agency representatives his memory loss was due to an epileptic event or (6) a hallucination. [*Id* at 21:18-23:18]. (7) At hearing, Christianson stated an MRI revealed a tumor in his brain, inferring another possible reason for his assaultive behavior, until he acknowledged the tumor was a benign meningioma that could not explain his behavior. [Christianson cross-exam; Exh. 12; Exh. 13]. Christianson expressed contrition only "that this medical condition occurred." [Exh. 10 at 11:18] and, when apologizing to Avila directly, expressed remorse that "you were caught up in this," evidently referring to his unproven medical condition.

The most notable aspect of Christianson's various explanations was that drinking to excess, - the most likely explanation of his behavior - was the only one he flatly denied.⁷ Given this failure of accountability, it remains unknown whether Christianson would reform the behaviors that led to his attack on Avila and Cisneros.

Based on the established seriousness of the violations, uncertainty of reform, and notwithstanding Christianson's exemplary record, the penalty of dismissal elected by Cleckley was within the range of penalties available to a reasonable administrator. [In re Quezada, *supra*, citing In re Garcia, *supra*; In re Redacted, *supra*].

VI. ORDER

The Agency's penalty of dismissal against Christianson, assessed on March 7, 2018, is **AFFIRMED**.

DONE August 6, 2018.



Bruce A. Plotkin
Career Service Hearing Officer

⁷ "I did not have typical alcohol symptoms...never vomited, never urinated as I would have if I'd been drinking heavily" [Exh. 10 at 15:42]. This self-diagnosis is suspect as Christianson was adamant that he remembered nothing between passing out in the stadium (after consuming 2 beers, homemade wine, and 2-3 gin and tonics in less than 2 hours, and presumably before being ejected) and when he was face-up on the ground after being pulled off Avila. As Christianson acknowledged, it was possible he drank and urinated during this blackout. [Christianson testimony].