HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 05-12

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

CHARLES HERNANDEZ, Appellant,

vs.

DENVER COUNTY COURT, ADULT PROBATION
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on April 17, 2012 before Hearing Officer Valerie McNaughton. Appellant was present and represented by Evan S. Lipstein, Esq. Assistant City Attorney Robert D. Nespor represented the Agency in these proceedings, and Probation Officer Supervisor Anita Klein served as the Agency's advisory witness. Having considered the evidence and arguments of the parties, the Hearing officer makes the following findings of fact and conclusions of law, and enters the following order.

I. STATEMENT OF THE APPEAL

Appellant Charles Hernandez appeals the one-day suspension imposed by the Denver County Court (Agency) on January 4, 2012. He asserts that the suspension violated the Career Service Rules, and was motivated by discrimination on the basis of his race, age, and/or sex. CSR §§ 15-100 et. seq., 19-10 2.a; 42 USC § 2000e-2. Agency Exhibits 1-7 and Appellant's Exhibit A, C, D, J and L were admitted into evidence.

II. ISSUES

The issues in this appeal are as follows:

1) Did the Agency establish by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules (CSR),

2) Did the Agency establish that a one-day suspension was within the range of penalties that could be imposed by a reasonable administrator for the violations established by the evidence, and

3) Did Appellant establish that his suspension was motivated by race, age, or sex discrimination?

III. FINDINGS OF FACT

Appellant Charles Hernandez was hired as a word processor by the Denver County Court on November 1, 1992, and became a Probation Officer a few months later. In 1998, he was promoted to Senior Probation Officer, a position he has held since that time.

Senior Probation Officers manage pre-sentencing and probation cases assigned to the Probation Department by criminal courts in a variety of cases. Each officer carries an average workload of 240 cases. Their duties include interviewing, counseling, submitting reports and sentencing recommendations to judges, and supervising clients on probation. If not appearing personally, a probation officer must submit the report to the Personal Court Representative (PCR) assigned to the courtroom scheduled to hear the show cause hearings and probation revocation matters. [Klein, Zaleski testimony.]

Several years ago, the probation officers developed by consensus their own one-page forms for their reports for show cause and probation revocation hearings. Appellant and others gradually adapted those forms for their own use over time. [Appellant, DeRoehn.] In August 2010, Probation Officer Anita Klein was promoted to supervisor, and instituted official forms for use in those types of hearings. [Klein; Exhs. 5-1, 5-3.] Appellant and some other officers continued to use their own forms. [DeRoehn, Appellant; Exhs. 5-2, 5-4.]

On Tuesday, October 25, 2011, Appellant submitted reports using his own forms to the PCR for eight cases set for the coming Thursday court dates. [Exhs. 5-2, 5-4.] At 10:31 that morning, Ms. Klein emailed all probation staff that they were all now required to use the official form for court preparation. The email stated,

> The forms attached, for those of you who aren't using them, are the ones required for court preparation. Should you choose to use an alternative form, the PCR and/or sup will return those cases to you and have you re-do your prep. I apologize that this note had to go out, ESP to folks who have been correctly doing this. Any questions see me. Anita

[Exhs. 4, 5-3.]

Appellant responded in an email, asking "Can I delete the Denver and Probation seals on the top of the form? Those 2 entries use a lot of ink." Ms. Klein responded, "no." [Exh. 4-2.] A few minutes later, Appellant asked, "And...I already completed my cases for this week and they have been distributed. I will start using the new form next week if that is okay." Ms. Klein responded, "No, effective now. Thanks." [Exh. 4-1.] Appellant testified he was unaware until that email that use of Ms. Klein's form was mandatory. Since he had spent about 90 minutes preparing the forms the previous Friday, he believed re-doing them would be unnecessarily time-consuming. As a result, Appellant added the defendant's name and some other information to the standardized form, stapled it to the form he had previously completed, and resubmitted both. [Appellant, Klein; Exh. 5.] The form Appellant used called for much the same content as the standardized form, and the courtroom PCR had no difficulty understanding Appellant's recommendations from his forms and communicating them to the judge. [LaFore, DeRoehn, Appellant.]

Pursuant to Ms. Klein's directive, the PCRs returned non-complying forms to the probation officers so they could be re-issued on the official form. [Klein, DeRoehn.] Probation Officer Lisa Hanson asked Ms. Klein if the modified forms she had submitted were sufficient. Ms. Klein directed her to use the official forms, and Ms. Hanson did so. The next day, Ms. Klein audited the court files prepared by her probation officers to monitor compliance with her directive. She determined that all had complied with the exception of Appellant, who submitted both his own form and the partially-completed official form. It is undisputed that Appellant thereafter consistently complied with the directive. [Klein ; Exh. J.]

After completing the audit, Ms. Klein sought out Appellant to discuss the matter, but could not find him. She then made copies of the forms he had submitted, and gave them to Chief Probation Officer Chris Zaleski. Mr. Zaleski then requested assistance from HR Professional Suzanne Razook to determine how to respond to Appellant's action. On November 2, 2011, Ms. Klein, Mr. Zaleski, and Ms. Razook met with Appellant to discuss the matter. On December 6, 2011, the Agency sent Appellant a letter stating that discipline was being considered for his failure to use the new forms for court preparation. [Exh. 1]. After the December 20, 2011 pre-disciplinary meeting, Ms. Klein issued a one-day suspension based on her findings that Appellant's action violated CSR §§ 16-60 A, J, and L, and that a one-day suspension was appropriate based on the nature of the conduct and the fact that he had received a written reprimand in the previous month. [Exhs. 2, 7.]

A week before the pre-disciplinary meeting, Mr. Zaleski held the regular monthly meeting for all probation staff. He remarked that ten percent of the staff was demanding 80% of his time, and that in the future he would devote his time to the 90% that were "on the bus." Many at the meeting assumed he was referring to Appellant and Elias Molina, both of whom are Hispanic and were the subject of recent disciplinary proceedings. After the meeting, co-workers jokingly referred to Appellant as a "ten-percenter." [Appellant, Molina, LaFore, DeRoehn.] Mr. Zaleski conceded that his statements were allusions to the recent disciplinary matters involving Appellant, Molina and Paula Gerbitz, who is married to a Hispanic.

Mr. Zaleski became the Chief Probation Officer in March 2011, and shortly thereafter had a conflict with Appellant based on the latter's practice of closing his door during meetings with defendants, contrary to Mr. Zaleski's policy. [Exh. A.] The Agency stipulated that Appellant is a good probation officer who earned "exceeds expectations" performance ratings for all but one year between 2000 and 2010. [Exh. L.] The November written reprimand was his first disciplinary action in his twenty years of employment. [Exh. 7.] Mr. Zaleski also disciplined Mr. Molina, a probation officer who had served ten years without previous discipline, in the fall of 2011. [Molina.] Appellant contends that his suspension and previous negative treatment by Mr. Zaleski - including ten counseling sessions, a May office reassignment, a June memorandum of expectations, and the November written reprimand - were harassment and were motivated by his race, sex and/or age. [Appellant; Exhs. 3, 6-5, 7, A, C.]

IV. ANALYSIS

The Agency bears the burden to prove by a preponderance of the evidence that the conduct stated in the disciplinary letter violates the Career Service Rules cited in the disciplinary action. The Agency must also establish that a one-day suspension is within the range of discipline that can be imposed by a reasonable administrator based on the proven violations and Appellant's employment and disciplinary histories. In re Gustern, CSA 128-02, 20 (12/23/02); Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975). Appellant bears the burden to establish his race, age, and sex discrimination claims by a preponderance of the evidence. In re Lombard-Hunt, CSA 75-07, 7 (3/3/08), *citing* St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510-512 (U.S. 1993).

A. VIOLATION OF DISCIPLINARY RULES

1. Neglect of duty under CSR § 16-60 A.

An employee neglects his duty within the meaning of this rule when he fails to perform a job duty he knows he is supposed to perform. In re Compos et al, CSA 56-08, 2 (CSB 5/21/09).

The Agency asserts that Appellant neglected his duty by failing to complete the official probation forms on October 25, as directed by his supervisor. Appellant does not deny that he received the email directing all officers to use the official forms. His subsequent actions indicate that he understood the email as an order to use the official forms. When he told Ms. Klein that he had already done the work on eight cases and asked permission to delay compliance until the following week, she reaffirmed that the order was effective immediately. In spite of this exchange, Appellant chose to resubmit his old forms, stapled to the partially completed new forms. Exhibit 5 contains the two forms submitted in two of Appellant's eight cases. As a result, the PCR was then required to review two forms in all of Appellant's cases in order to represent the Department's position in court that Thursday. [LaFore.] Appellant conceded that the original work consumed only about ten minutes per case, or a total of 90 minutes.

The duty at issue as to this allegation is use of the official court preparation forms to communicate sentencing recommendations, an important part of a probation officer's job. Appellant's resubmission of his forms attached to the official form containing only minimal information did not constitute performance of that clearly communicated duty. The Agency therefore established that Appellant violated CSR § 16-60 A.

2. Failure to comply with lawful orders under CSR § 16-60 J.

Violation of this rule is established by proof that a supervisor communicated a reasonable order, and the subordinate violated that order under circumstances demonstrating willfulness. In re Sawyer and Sproul, CSA 33-08, 9 (1/27/09).

The undisputed evidence showed that Appellant's supervisor ordered all probation officers to use the official forms for all cases, effective immediately. Appellant did not do so, but chose instead to attach his forms to the approved forms, adding only the name of the defendant and his unsupported recommendation. [Exh. 5.] He testified that he believed re-doing the forms would have been too time-consuming. That does not disprove that he took those actions deliberately, with knowledge of the order to use the official forms. In addition, he presented no evidence that his workload of about 240 cases rendered compliance with the order impossible or impractical. Appellant conceded that it took him only about ten minutes to complete each of his original forms. All of the other officers submitted their cases on the approved forms, and Ms. Hanson redid her work after her forms were returned by the PCR. This evidence demonstrated that compliance was achievable, and was in fact achieved by all other officers.

An order to use an official form is reasonable under the circumstances of this appeal. An important element of the job of a probation officer is to efficiently gather and communicate facts and recommendations to court personnel and judges handling a heavy docket which resolves the legal rights of criminal defendants, including their liberty. An official form can provide a predictable structure for that information, increasing the efficiency of the legal proceedings. Appellant's failure to comply required the PCR to glean information from two forms in order to support the Probation Department's recommendations to the judge.

Appellant does not argue that the order was itself unreasonable, but rather that compliance would have consumed more time, since he had already prepared his forms and there were only two days before the relevant hearings. I find that argument unpersuasive because all other officers were able to comply with the order, despite the short time frame. Ms. Hanson was faced with the same issue, as she had also prepared her forms in advance of Tuesday morning's order. Nonetheless, Ms. Hanson redid her forms after Ms. Klein personally confirmed her need to do so. This demonstrates that the order was attainable despite the

heavy caseload carried by probation officers.

Thus, the Agency proved that a clear and reasonable order was issued, and Appellant understood the order but intentionally failed to comply with it, in violation of this rule.

3. Failure to observe written agency regulations, policies, or rules under CSR § 16-60 L.

An employee violates this rule where he has notice of a clear, reasonable, and uniformly enforced policy, and fails to follow that policy. In re Mounjim, CSA 87-07, 6 (CSB 1/8/09). The Agency contends that Ms. Klein's email constituted its policy that the official court preparation forms were mandatory as of October 25, 2011. Appellant does not argue that the email was not an official policy or rule. I find that the email did communicate a rule within the meaning of CSR §16-60 L because it governed the method by which all officers were to perform their duty to report sentencing and probation matters to the court, a matter subject to a uniform policy based on the business needs of the Agency.

As found above, the written email confirmed that officers were to stop using their own adaptations and use the official forms. All employees understood and obeyed the directive, with the exception of Appellant. Thus, the Agency proved Appellant violated this rule by failing to observe an agency rule.

B. APPROPRIATENESS OF PENALTY

The level of discipline imposed by an agency must not be disturbed unless clearly excessive or not supported by substantial evidence. In re Owens, CSA 69-08, 8 (2/6/09). In evaluating the proper degree of discipline under the Career Service Rules, an agency must consider the severity of the offense, an employee's past disciplinary record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20; In re Norman-Curry, CSA 28-07, 23 (2/27/09). The reasonableness of discipline is determined by the facts of each case.

As previously determined, the Agency proved Appellant violated three Career Service Rules by his failure to comply with his supervisor's order to use the official forms. It is undisputed that the one-day suspension was only the second disciplinary action in Appellant's twenty years' employment, following a written reprimand for a minor incident the previous month. [Exh. 7.] The suspension achieved its ultimate goal of correcting the behavior by means of using the next step in the progressive discipline system under CSR § 16-50. I find that the degree of discipline was not excessive and was supported by substantial evidence, including consideration of Appellant's past discipline and employment history.

C. DISCRIMINATION CLAIMS

An employee claiming discrimination bears the burden to establish a prima facie case by evidence that he was a member of a protected class, and was subjected to an adverse employment action under circumstances giving rise to an inference of discrimination. In re Abdi, CSA 63-07, 30 (2/19/08); Shumway v. United Parcel Service, Inc., 118 F.3d 60, 63 (2nd Cir. 1997). That burden is not an onerous one, and can be accomplished by "the cumulative weight of circumstantial evidence", given the unlikelihood of direct evidence of an employer's discriminatory intent. Luciano v. Olsten Corp., 110 F.3d 210, 215 (2d Cir.1997). One method of raising an inference of discrimination is proof that the claimant was treated less favorably than other employees who were not members of the protected class. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. Once that is presented, the claimant must offer credible evidence that the proffered reason

is a mere pretext for discrimination. Shumway, id.; citing Luciano, id.; Montana v. First Fed. S & L of Rochester, 869 F.2d 100, 106 (2d Cir.1989).

Appellant established that he is a Hispanic male protected by law from race discrimination, and that his suspension was an adverse action. Appellant proved that Mr. Zaleski disciplined him and another Hispanic male, Elias Molina, over the past few months. It remains to be determined whether Appellant brought forth evidence from which a discriminatory motive may be inferred.

Appellant claims that Mr. Zaleski singled them out for ridicule at a December staff meeting when he referred to "the ten percent" of the employees who were "not on the bus." Mr. Zaleski conceded that he said some on the staff were causing him more work, and that he would in the future devote his time to those who were complying with policies. Appellant also claims that Mr. Zaleski's numerous negative actions towards him since he became Chief Probation Officer in March 2011 demonstrate discriminatory animus.

The evidence shows that each action taken by Mr. Zaleski toward Appellant was equally applicable to all employees. All probation officers were moved at the same time to the same floor, and Appellant admitted he obtained his chosen office on that floor based on his tenure as a twenty-year employee. The rule prohibiting closed doors during meetings with probationers was enforced for all officers. Likewise, the memorandum of expectations and written reprimand were based on policies and rules equally applicable to all staff. Appellant failed to present any evidence that the Agency's stated reason for the adverse action was a pretext for discrimination. There is no evidence that Appellant's discipline or Mr. Zaleski's comments at the December meeting were based on Appellant's race or sex, and there is persuasive evidence that it was the Appellant's misconduct rather than discrimination that justified to the adverse action. Appellant failed to present any evidence to support the age discrimination claim. I find that Appellant did not prove his claims of discrimination on any of the three claimed bases.

Order

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered as follows:

1. The Agency's one-day suspension action dated January 4, 2012 is AFFIRMED.
2. Appellant's race, sex and age discrimination claims are DISMISSED.

DONE June 4, 2012.

Valerie McNaughton
Career Service Hearing Officer