

**HEARINGS OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**

Appeal No. 03-06

DECISION

IN THE MATTER OF THE APPEAL OF:

DENNIS HERNANDEZ,
Appellant,

vs.

DENVER HEALTH AND HOSPITAL AUTHORITY,
Agency, and the City and County of Denver, a municipal corporation.

I. INTRODUCTION

The Appellant, Dennis Hernandez, appeals his dismissal from employment by Denver Health and Hospital Authority, the Agency. The Appellant was dismissed for alleged violation of specified violations of the Career Service Rules (CSRs) on January 6, 2006. The Appellant filed a timely appeal January 13, 2006. A hearing concerning the appeal was conducted by Bruce A. Plotkin, Hearings Officer, on March 10, and March 20, 2006. The Appellant was present and was represented by Ira E. Greschler, Esq. The Agency was represented by Mark B. Wiletsky, Esq. Nancy McDonald, RN served as the Agency's advisory witness throughout the proceedings. Agency Exhibits 1-6 were admitted while Appellant's Exhibits A.10-A.14, A.22, A.26, C, F, I, J, L, N, and Appellant's Rebuttal Exhibits O and P were admitted. The Agency presented the following witnesses: Elisha Oliva, MD, Jeanette Urban, RN, Mr. Chuck King, and Nancy McDonald, RN. The Appellant testified on his own behalf and also presented the following witnesses: John Elston, RN, Ms. Rose Haury, Ms. Innel Brent, Jim Johnson, RN, Jinx Finch, RN, Sandra Walker, RN, Ms. Dawn McKinnis, Sandy Bergemann, RN, and Ms. Sandra Lerma.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Appellant violated any of the following CSRs: 16-50 A. 7), 10), 20), or CSR 16-51 A. 2), 4), 5), 10), or 11);
- B. if the Appellant violated any of the aforementioned CSRs, whether the discipline imposed conformed with, and fulfilled the purpose of discipline, under CSR 16-10;
- C. whether the Agency unlawfully discriminated against the Appellant based on either his age or his Hispanic origins;
- D. whether the Agency unlawfully harassed the Appellant;
- E. whether the Agency unlawfully retaliated against the Appellant;
- F. if the Agency engaged in unlawful discrimination, harassment, or retaliation against the Appellant, whether the Agency would have dismissed the Appellant for other, non-discriminatory, non-harassing reasons.

III. FINDINGS

For 13 years, the Appellant was a Registered Nurse in the psychiatric ward of the Denver Health Medical Center. He was generally well-liked by the doctors he served, by the patients he attended, and by his peers. It also appears he was effective or even excelled in most of his duties; however he was assessed a written reprimand in 1999, and a three-day suspension in 2004, *inter alia*, for using terms of endearment such as "baby," "honey," and "momma," with female co-workers and patients.

On April 4, 2005, the Appellant filed a complaint against his supervisor, Nancy McDonald, RN and others in which he alleged McDonald harassed him by creating a hostile work environment. The complaint also alleged discrimination based upon the Appellant's national origin, Hispanic. Appellant's Rebuttal Exhibit P. The investigation, conducted by Chuck King, Manager of Employee Relations at the Agency, concluded there was no discrimination as alleged by the Appellant.

It was evident the relationship between the Appellant and McDonald was, at best, strained. Seven witnesses testified McDonald appeared to be "overly sensitive" toward or "picked on" the Appellant. The tension between them was

apparent to others in the Psychiatric Ward. Nonetheless, the Agency decided discipline was warranted based upon the following two reports.

A. Between October and December 2005, Dr. Oliva, a female resident, served a rotation at the Agency. Shortly after she began, she had a "disagreement" with McDonald on October 27, 2005. Oliva called McDonald later the same day to smooth things over and to explain why she had a bad day. Oliva explained the Appellant approached her from behind, either touched, grabbed, or stroked her ponytail and said "oh, it's so soft," or that he liked her hair that way. She did not say anything to the Appellant, but explained the incident "kinda threw my day." [Appellant testimony]. She also told McDonald the Appellant, at some earlier unspecified times, called her "babe" or "baby," said "let me take care of you," and asked "[d]o you have a sister?" Oliva took the last statement to mean the Appellant wanted to know if she had a sister he could meet. She described her reaction to the Appellant's various acts as "uncomfortable," or "irritated" or "taken aback." It appears these incidents were isolated. Oliva did not address these earlier issues with the Appellant, but explained to McDonald she felt the contact and references were inappropriate, unprofessional and offensive. [Exhibit 1.2, Oliva testimony].

McDonald referred Oliva to King. King asked Oliva to write a formal complaint, but Oliva refused because she was concerned her working relationship with the Appellant and others might be affected. King later approached Oliva at work to have her review McDonald's statement relating to the incident, but Oliva told him "[p]lease don't ever come up to the unit looking for me ever again." Oliva never reviewed McDonald's statement. After October 27, Oliva stated she dreaded having contact with the Appellant, even though their duties required them occasionally to work together. McDonald did not pressure Oliva to pursue the matter. [Oliva, McDonald testimony].

B. Since the Psychiatric Unit functions 24 hours per day in three shifts, at each shift change there is a brief "change meeting" during which outgoing staff explain the status of patients and incidents about which oncoming staff should be aware. On November 4, 2005, either immediately before or just after the change meeting began, the Appellant entered, snapping his fingers above his head, and gyrating his hips. He exclaimed "it's the luuuuv dance!" This lasted some five to ten seconds until the Appellant saw McDonald. He quietly said "oops," and sat down without further incident. McDonald did not say anything to the Appellant about either the Oliva or "love dance" incidents until serving him with a contemplation of discipline on December 9, 2005.

A pre-disciplinary meeting with the Appellant was held on January 5, 2006. Following the meeting, the Agency issued its notice of disciplinary action terminating the Appellant's employment the following day, effective immediately. This timely appeal followed.

IV. ANALYSIS

The Agency alleged the Appellant violated the following Career Service Rules, each of which is treated in the order alleged.

A. CSR 16-50 A. 7) Refusing to comply with the orders of an authorized supervisor or refusing to do assigned work which the employee is capable of doing.

Here, the Agency must demonstrate: (1) someone with proper authority within the Agency gave an order to the Appellant; (2) the order was reasonable; (3) the Appellant had reasonable notice of the order; (4) the Appellant was capable of complying; and (5) the Appellant refused to comply. See In re Trujillo, CSA 28-04, 9-10 (5/27/04), In re Tina Martinez, CSA 19-05, 6 (6/27/05), In re Conway, CSA 40-05, 3 (8/16/05). The Agency claims the Appellant violated prior orders to desist in his use of terms of endearment with female co-workers when he referred to Oliva as “babe” or “baby.”

1. Authority. The Appellant did not dispute that two different supervisors disciplined him for his use of terms of endearment. The supervisors in each case ordered the Appellant to desist referring to female employees as “babe,” “honey,” “sweetie,” “sweetheart,” and “momma.” [Exhibit 5.2, Appellant cross examination]. In addition, previous work reviews by his supervisor contained the same caution. [Exhibit 6.3]. This element is therefore established.

2. Reasonableness. In 1999 the Appellant was issued a written reprimand for his use of terms such as “baby girl,” and “oh girl, you are so sexy.” [Appellant cross-exam], and he was suspended for three days in 2004, for, *inter alia*, his use of the terms “babe,” “honey,” “momma,” and “sweetie.” [Exhibit 5]. While Innel Brent testified she and the Appellant used to refer to each other as “poppa” and “momma” [Brent testimony], others considered the Appellant’s use of such terms inappropriate. In his 2004 suspension, the Appellant made sexually explicit comments to a female co-worker, and questioned her about her sex life, to the alarm of the co-worker. In addition, the Appellant asked another co-worker to give the complainant a condom. Under those circumstances, the Appellant’s use of terms of endearment with that co-worker took on a decidedly different tenor, compared with his use of similar terms with a close friend. Other women at that time reported they were offended by the Appellant’s use of terms of endearment. [Exhibit 5.2]. In addition, the Appellant was cautioned previously about similar behavior in his work evaluations. [Exhibit 5.3, C-11].

If the Agency ordered the Appellant to desist in his use of the term “momma” with Innel Brent, the order would have been unreasonable given their close friendship, Brent’s consent to use of those terms, and lack of harm to the Agency. However, in light of the previous discipline and work reviews concerning

the Appellant's inappropriate use of terms of endearment, the Agency's order to desist was reasonable.

3. Ability to comply. There was no dispute over this element.

4. Refusal. The Appellant implicitly denies this element, as he stated he never referred to Oliva by any term of endearment. He also denied ever having touched Oliva's hair. [Appellant testimony]. He also denied engaging in a dance when he entered the change meeting on November 4, 2005. *Id.* For reasons stated below, the Hearings Officer finds the Appellant's denial unconvincing. The Appellant also testified, alternatively, he has tried to comply, but finds it difficult to change. Either way, the issue remains whether the Appellant's failure to comply with prior orders amounted to a refusal. Proof of refusal requires some evidence of intent to disobey. In re Trujillo, CSA 28-04, 9-10 (5/27/04). The Agency's evidence here is the Appellant's prior failures to heed its orders to desist in his use of terms of endearment.

As there was no witness to the Appellant's alleged violations, the respective credibility of each party must be weighed in order to determine whether the charge is substantiated by a preponderance of the evidence. Oliva's credibility was not challenged, and McDonald apparently put no pressure on her to invent the incidents. [Oliva, McDonald testimony]. Since Oliva testified she was new to the unit and did not even know the Appellant's name at the time of the incidents, it is doubtful she had any underlying motive to harm the Appellant by inventing the interactions between them.

On the other hand, the Appellant admitted he frequently used the terms "babe" and "baby" with female co-workers in the past, and that it was a hard habit to break. [Appellant testimony]. Oliva's recollection of the Appellant's words was therefore consistent with the Appellant's history of using those same terms. Finally, the Appellant testified he did not dispute Oliva's recollection. *Id.* For these reasons, the Hearings Officer concludes the Appellant did refer to Dr. Oliva as "babe" or "baby".

Regarding the "love dance" incident, the Appellant's own witness, John Elston, stated the Appellant entered the meeting laughing and doing a little dance which Elston had seen him do 80-120 times before. Elston recalled the Appellant declaring "it's all about the love," but emphatically denied the action was sexual in nature. Elston explained the Appellant often joked around to lighten the mood in what can be a very trying environment. [Elston testimony]. The Appellant did not challenge Elston's recollection, and the Hearings Officer finds Elston's testimony credible. The Hearings Officer concludes the two events occurred as alleged in the Agency's notice of discipline. The next step is to determine whether the Appellant intentionally failed to comply with prior Agency orders in the incidents involving Oliva, and at the November 4 change meeting.

As referenced above, the Appellant had been disciplined in 1999, and again in 2004, for his refusal to comply with directives to cease calling female co-workers by affectionate names. In addition, at least one work review gave the same directive. Therefore, not only had the Appellant been given ample notice of the directive to change, but the nature of the notice – disciplinary actions and an annual review - added gravity to those communications, making it unlikely there was any possibility the Appellant was no longer aware of the directive when he addressed Oliva as “babe” or “baby.” Given these circumstances, the Hearings Officer concludes the Appellant was aware of, and intentionally ignored, his supervisor’s order when he addressed Oliva as “babe” or “baby” in violation of CSR 16-50 A. 7). The Agency failed to produce any evidence the Appellant’s dance on November 4, 2005 was a violation of this rule.

B. CSR 16-50 A. 10) Discrimination or harassment of any employee or officer of the City and County of Denver for any reason...

Discrimination concerns the unfair or unequal treatment of a person, or group, based upon race, color, age, national origin, religion, sex, disability or veteran status. Katz v. City of Aurora, 85 F. Supp. 2d 1012 (D. Colo., 2000). It was unclear from the Agency’s case what actions by the Appellant were deemed discriminatory, since the Appellant was not in a position to create an unfair or unequal treatment of Oliva by his actions.

Harassment is the creation of a hostile work environment. Harris v. Forklift Sys., 510 U.S. 17 (1993). The harassing conduct must be sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment. *Id.* In order to sustain a violation under the harassment component of this rule, the conduct must be either so severe that a single incident merits discipline, or the offensive conduct, while not sufficiently outrageous to warrant action for any one incident, must be sufficiently pervasive to violate the rule. It may be helpful to think of the severe and pervasive variations, above, as a graph where the X coordinate represents the severity of conduct while the Y coordinate represents pervasiveness, so that both a single but outrageous action, and a minor offense repeated over many months, might contain points at a same level, therefore meriting similar discipline.

Under a reasonable person standard, nothing in the record, suggests the Appellant’s actions toward Oliva were either sufficiently outrageous or sufficiently pervasive to merit action under this rule, so the Appellant’s behavior toward Oliva, alone, does not rise to the level of actionable harassment. See In re Tafoya, CSA 72-04, 8 (9/21/04). Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. Faragher v. City of Boca Raton, 524 US 775, 778 (1998). Moreover, since Oliva viewed the Appellant’s conduct as uncomfortable or irritated, but not abusive, then the Appellant’s conduct did not alter the conditions of the Oliva’s employment in violation of this rule. Harris v. Forklift Sys., 510 U.S. 17, 21-22 (1993).

In addition, neither Oliva nor any supervisor informed the Appellant that his conduct toward Oliva was offensive, until the Agency served its notice of discipline on the Appellant. Such notice is necessary where the conduct is not objectively discriminatory as is the case here. Under these circumstances, the Agency failed to establish a violation of CSR 16-50 A. 10) by a preponderance of the evidence.

C. CSR 16-50 A. 20) Conduct not specifically identified herein may also be cause for dismissal.

The Agency identified the specific conduct, described above, as its basis for discipline. No other basis for discipline is found. Therefore the Hearings Officer declines to apply this rule.

D. CSR 16-51 A. 2) Failure to meet established standards of performance including either qualitative or quantitative standards.

This rule covers performance deficiencies that can be measured either by qualitative or quantitative standards such as those one would find in a performance evaluation. In re Castaneda, CSA 79-03, 12 (12/18/02). The Agency cautioned the Appellant in his 2003 performance review that he continued to offend and to make female co-workers and patients uncomfortable in how he addressed them. [Exhibit 5.3, C.11]. The Appellant's addressing Oliva as "babe" or "baby" – the very terms about which he was previously advised – constitute a violation of CSR 16-51 A. 2.

E. CSR 16-51 A. 4) Failure to maintain satisfactory relationships with co-workers, other City and County employees or the public.

Oliva was a co-worker of the Appellant during the time he touched her hair and referred to her as "babe" or "baby." Oliva testified that after the aforementioned incidents she dreaded working with the Appellant. The Appellant's denial of the incidents has already been discounted. The question remains whether Oliva's reaction to the Appellant's conduct is sufficient to find a violation of this rule. A less than ideal working relationship with others does not, by itself, establish a violation of this rule, which requires proof the working relationship is not satisfactory. In re Keegan, CSA 69-03, 11 (3/31/04). Despite Oliva's stated dread at working with the Appellant, the Agency presented no evidence that Oliva and the Appellant were unable to work effectively together following any incident of which Oliva complained. Oliva did not report the earlier incidents and adamantly refused to file a complaint. [Oliva testimony]. Given these circumstances, the Hearings Officer finds the Agency did not meet its burden to prove the Appellant violated CSR 16-51 A. 4) by a preponderance of the evidence.

F. CSR 16-51 A. 5) Failure to observe departmental regulations

Denver Health Employee Principles and Practices #4-106: Sexual harassment and Discrimination. [Exhibit 2]

Sexual harassment is defined in the Agency's regulations as "unwelcome sexual advances, requests for sexual favors and other physical, verbal, or non-verbal conduct based on sex. *Id.* The Hearings Officer finds the Appellant's behavior toward Oliva did not meet the Agency's definition for sexual harassment. Oliva conveyed her dismay at the Appellant's lack of professionalism and inappropriate crossing of a professional/familiar boundary, but she did not convey the sense that his conduct was sexually oriented. Most telling was her response to the question how she felt about the Appellant's asking if she had a sister. Oliva stated "I can't really infer what he meant by that question," and in response to how she felt about being called "babe" "baby" or "honey," Oliva suggested, inconclusively, that maybe the Appellant was "hitting" on her, and that she had never been addressed that way in professional circles. The case law does not generally support a finding of sexual harassment and sexual discrimination in cases involving conduct similar to that of the Appellant.¹

The Agency advanced no evidence that the Appellant discriminated against Oliva or subjected her to sexual harassment. For reasons here and immediately above, the Agency failed to prove the Appellant violated the above-cited Agency regulation, and consequently failed to prove the Appellant violated CSR 16-51 A. 5).

G. CSR 16-51 A. 10) Failure to comply with the instructions of an authorized supervisor.

As found above in paragraph IV A., the Agency established the Appellant ignored his supervisor's order to desist in addressing female co-workers with terms of endearment. This rule differs from CSR 16-50 A. 7) only in that intent is not required to find a violation hereunder. Thus, for the same reasons as found in the discussion of CSR 16-50 A. 7) above, the Hearings Officer finds the Appellant also violated CSR 16-51 A. 10) by a preponderance of the evidence.

H. CSR 16-51 A. 11) Conduct not specifically identified herein may also be cause for progressive discipline.

The Agency identified the specific conduct described above as its basis for discipline. No other basis for discipline is found. Therefore the Hearings Officer declines to apply this rule.

¹ In a case similar to the instant case, an Appellant's termination for calling a subordinate "sweet thing" more than once was reduced to a 30-day suspension where the court found his comments were in violation of agency rules but not sexual harassment, the Appellant had a long work history with his agency, and the court determined a monetary loss was a more appropriate penalty to the offense. *Dubiel v. USPS*, 54 MSPR 428, 433-34 (1992).

V. APPELLANT'S DISCRIMINATION CLAIMS

A. Race Discrimination.

The requirements for establishing an employment discrimination case are: 1. the employee belongs to a protected class; 2. the employee was qualified for the job at issue; 3. despite his qualifications, the employee suffered an adverse employment decision e.g. a demotion or discharge or a failure to hire or promote; and 4. the circumstances give rise to an inference of unlawful discrimination. In re Cobb, CSA 163-03 (2/5/04).

The Appellant claims the Agency engaged in unlawful discrimination against him based upon his Hispanic origin, a protected class. His evidence was that the Manager of Employee Relations, Chuck King, undertook an investigation following the Appellant's complaint of discrimination and harassment, filed April 2005. King concluded there was no evidence of either discrimination or harassment [Appellant's rebuttal Exhibit P]; however, the Appellant claimed the King report shows that, out of four Hispanic males supervised by McDonald, two, including the Appellant, were disciplined within the same year as the Appellant. [McDonald cross-examination]. This evidence fails to establish an inference of discrimination as the other Hispanic male was terminated for excessive absenteeism, and was therefore not similarly situated to the Appellant. See Mensah-Sowah v. Bridgestone/Firestone, 1996 U.S. App. LEXIS 24967 (10th Cir. 1996).

The Appellant also offered testimony from Rose Haury, a Psychiatric Technician who works with the Appellant. Haury recalled another nurse uses terms of endearment similar to those employed by the Appellant, but was unaware if the other nurse was made aware of, or was disciplined for it. Haury did not state whether she was aware either of the national origin of the other nurse, and did not state when, and under whose supervision, this occurred. In short, Haury's testimony did not identify a similarly situated employee for purposes of establishing the Appellant's discrimination or harassment claims.

The Appellant stated he was previously disciplined by a different supervisor for his persistent use of terms of endearments, but acknowledged he respected the prior supervisor and had no issue with the discipline assessed by her. [Appellant cross-exam]. The Appellant therefore fails to establish how his evidence infers causation between the Agency's discipline and discriminatory intent. Had the Appellant established causation, the Agency presented a valid business reason to assess discipline, his failure to heed prior discipline. For these reasons, the Appellant's national origin discrimination claim fails. ✓

B. Age Discrimination.

To establish a *prima facie* case of age discrimination, the Appellant must show membership in a protected age group, more than 40 years old, an adverse employment

action, and that similarly situated employees were treated differently. The Appellant failed to establish whether any younger person who also used terms of endearment was disciplined less severely, or at all. He presented no evidence to show McDonald was even aware of his age. Haury did not testify whether she was aware of the age of the nurse who also uses terms of endearment. The Appellant therefore failed to establish a *prima facie* case for his age discrimination claim.

VI. APPELLANT'S HARASSMENT CLAIM

The Appellant claims harassment under CSR 15-100 *et seq.* He also claims harassment under a theory of national origin discrimination, and under a theory of age harassment. [Appellant's Amended Pre-hearing Statement]. The test to establish harassment is well established: the Appellant must show, under the totality of the circumstances, (1) the harassment was pervasive or severe enough to alter the terms, conditions, or privilege of employment, and (2) the harassment was based upon a protected status or stemmed from animus against a protected status. In addition, a showing of pervasiveness requires more than a few isolated incidents of enmity based upon his protected status. He must produce evidence to show that the workplace was permeated with discriminatory intimidation, ridicule, and insult sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment. Bloomer v. UPS, 94 Fed. Appx. 820 (10th Cir. 2004). The Appellant claims the following facts substantiate his harassment claims.

(1) In March 2005, McDonald assessed a verbal reprimand against the Appellant for failing to type his progress notes rather than write them due to his allegedly poor handwriting. [Exhibit 4]. Then one month later, McDonald assessed a written reprimand for the same reason. [Exhibit 3]. (2) In April 2005 the Appellant brought discrimination and harassment claims against McDonald. [Appellant's Rebuttal Exhibit P]. One of the Appellant's main assertions underlying his claim was McDonald required him, and no other staff member with poor writing, to type his patient progress notes. The investigation into the Appellant's claims concluded there was insufficient evidence to substantiate the Appellant's claims. (3) The Appellant also claimed McDonald informed him about complaints² against him without specifying who made the complaints. [Appellant testimony].

Regarding the Appellant's handwriting, some of the Appellant's witnesses suggested he was "picked on" by McDonald compared with others under her charge. [Johnson, Finch, Walker, Elston, McKinnis, Bergeman, Hauer testimony], while others acknowledged the Appellant's handwriting is difficult to read. [Finch, Johnson]. Johnson was unable to state how McDonald treats others, Walker was unable to state whether others were disciplined for failing to type their notes, and Bergemann did not offer any testimony regarding whether others under McDonald's command were disciplined or

² The Appellant never specified the nature of the complaints.

otherwise advised about bad handwriting. Most importantly, no witness observed that McDonald harassed the Appellant based either upon his national origin or his age, as asserted by the Appellant, and as required by the Bloomer test, above.

Next, regarding unspecified complaints made against him, the Appellant stated “[s]he had a complaint for me every other day, almost, but she never told me who was complaining.” The Appellant presented no evidence upon which this claim might relate to a protected status. Rather this evidence sounds more in the nature of a personal opinion. Statements of personal opinion, even when reflecting a personal prejudice or bias, do not constitute direct evidence of discrimination. Shorter v. ICG Holdings, Inc., 188 F.3d 1204, 1207 (10th Cir. 1999). Moreover, the tension between McDonald and the Appellant appears to be a mutual creation, as some witnesses indicated the Appellant was unresponsive or even antagonistic toward any criticism by McDonald. [Haury testimony, Appellant’s Rebuttal Exhibit P]. Finally, at hearing, the Appellant reiterated his 2004 claims concerning harassment, but did not provide new evidence.

Under the totality of the circumstances described above, the Appellant’s evidence upon which his harassment claims were made do not show McDonald’s harassment, if any, was pervasive or severe enough to alter the terms, conditions, or privilege of employment, nor did the Appellant show that McDonald’s actions against him stemmed from national origin or age animus. Bloomer @ 825. The Appellant’s harassment claims therefore are not proven by a preponderance of the evidence.

VII. RETALIATION

In order to establish a claim for retaliation, the Appellant must demonstrate causation between a protected activity undertaken by him and some adverse action by the Agency. Robben v. Runyon, 2000 U.S. App. LEXIS 1358 (10th Cir. 2000). In addition, the Appellant must prove the Agency action was intentionally retaliatory. Gunnell v. Utah Valley State College, 152 F.3d 1253 (10th Cir. 1998).

The Appellant’s formal complaint in April 2004 against his supervisor, McDonald, qualifies as a protected action. *Id.* On the other hand, the Agency dismissed the Appellant over one and one half years after his complaint about McDonald, so the temporal connection between the protected activity and the Agency action is too tenuous to infer causation,³ absent other evidence of retaliatory intent. See *id.* at 1263.

³ 1 ½ months between protected activity and adverse employer action was deemed sufficiently proximate to infer causation, while 3 months was found too remote (Freeman v. Santa Fe Ry., 2000 U.S. App. LEXIS 22343 (10th Cir. 2000)), and 4 months too remote (Hemsing v. Philips Semiconductors, 1999 U.S. App. LEXIS 15152 (10th Cir. 1999)).

VIII. CONCLUSION

The Agency proved, by a preponderance of the evidence, the Appellant refused to obey a reasonable order of a supervisor, failed to meet established standards, and failed to comply with a reasonable order of a supervisor with respect to his conduct toward Oliva on and prior to October 27, 2005. The evidence indicates the November 4, 2005 "love dance" incident was just as likely a harmless jest intended to lighten a somber work environment, as it was an outrageous and disruptive, or sexually demeaning act. Therefore, the Agency failed to prove by a preponderance of the evidence the Appellant violated any Career Service Rule regarding the "love dance" incident.

IX. LEVEL OF DISCIPLINE

The correct test to determine the propriety of discipline is whether the degree of discipline is reasonably related to the seriousness of the offense, taking into consideration the Appellant's past disciplinary record. CSR 16-10. Discipline is reasonably related if it falls within the range of reasonable alternatives available to a reasonable, prudent agency administrator. *In re Armbruster*, CSA 377-01 (3/22/02), *citing Adkins v. Div. of Youth Services*, 720 P.2d 626 (Colo. App. 1986). In determining whether the discipline imposed is within the range of reasonable alternatives, the hearings officer will not disturb the Agency's determination of the severity of the discipline unless it is clearly excessive or based substantially on considerations that are not supported by a preponderance of the evidence. *Id.*

The discipline imposed by the Agency was assessed under the assumption the Appellant engaged in sexual harassment against a co-worker, and especially that his sexual harassment was repetitive, based on prior discipline. [Exhibit 5]. However, the evidence does not sustain the conclusion that his conduct with Oliva was sexual harassment. Therefore, prior discipline must be considered only for its value in failing to meet established standards and for refusing and failing to comply with the instructions of an authorized supervisor, but not as indicative of unabated sexual harassment which created a hostile work environment. Without having established sexual harassment, and having failed to establish any rule violation for one of the two cited incidents, the Agency's justification for termination is significantly diminished. Another factor to consider is the Appellant generally had served the Agency well for thirteen years.

In terms of discipline, what this case boils down to is whether, even in light of two prior violations for similar conduct, firing someone is a reasonable action to take for calling a co-worker "babe" and saying "[your hair] is so soft." The Appellant's disciplinary history indicates some action is justified due to his prior refusal to comply with instructions; however, the Appellant's struggle to amend his behavior, as attested by Innel Brent, the infrequency of the offensive conduct and, most importantly, and the

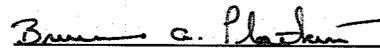
relatively inoffensive nature of the conduct compared with sexual harassment cases, do not justify termination.⁴

Based upon a review of cases similar to the present case, it appears a 30-day suspension is the maximum penalty the Agency could reasonably impose for the Appellant's actions vis-à-vis Oliva. See Dubiel and Brim, n. 4, *below*.

X. ORDER

The Agency's termination of the Appellant's employment on January 6, 2006 is AMENDED, and is replaced by a thirty (30)-day suspension, *nunc pro tunc* January 6, 2006.

DONE this 3rd day of May, 2006.



Bruce A. Plotkin
Hearings Officer
Career Service Board

S:/Share/hearings/Cases Completed/Hernandez, Dennis 03-06/Decision.doc

⁴ Termination, especially, seems reserved for either a single outrageous act, or an ongoing pattern of conduct so severe as to alter the complainant's working conditions. Neither condition is found here. Thus, termination of a male supervisor was upheld following his continuous sexual harassment of three female subordinates over 18 months, Snipes v. USPS, 677 F. 2d 375 (4th Cir. 1982). A male employee was discharged after he brushed up against a female co-worker, and touched her buttocks in a "sexually suggestive manner." The employee had undergone training on prevention of sexual harassment on several occasions, and had previously made "deliberately suggestive physical contact with military wives when he was dispatched to make repairs in their homes." LaChance v. Duvall, 178 F. 3d 1246 (Fed. Cir. 1999). More typically, however, was the Dubiel case, *supra at n.1*, where termination of a male supervisor for calling a subordinate "sweet thing" more than once was reduced to a 30-day suspension. The court found, as here, the male employee's comments were a violation of Agency rules and not sexual harassment, the Appellant had a long work history with the Agency, and the court found that a monetary loss was more appropriate to the offense. A 30-day suspension was deemed the maximum reasonable penalty for offensive language where two male supervisors spoke to each other in voices loud enough to be heard and boasted to each other of their sexual prowess, where the ongoing remarks found, as here, not sexually harassing, but offensive nonetheless. Brim v. USPS, 49 MSPR 693 (1992). The Appellants in that case, unlike here, were supervisors. Continued unwanted touching by an ALJ of female hearing assistants warranted a 70-day suspension. SSA v. Carter, 35 MSPR 485 485 (1987). However, in co-worker sexual harassment cases, as opposed to supervisor/subordinate relationships, the penalties appear to be concomitantly less. Thus, a three-day suspension was deemed appropriate where the male perpetrator of co-worker harassment regularly made sexually inappropriate comments to a female co-worker. The comments included references to oral sex and remarks about her appearance. The male co-worker would sing a sexually suggestive song while making suggestive hand gestures, and would often tell her she "needed to get rid of [her boyfriend] and find a real man." Dean v. Boeing Co., 61 Fed. Appx. 576, 578 (10th Cir. 2003).