

DECISION AFFIRMING 10-DAY SUSPENSION

TENAJ TANNENBAUM, Appellant,

v.

OFFICE OF THE CLERK AND RECORDER,
and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

This is an appeal of Appellant's 10-day suspension for alleged violations of specified Career Service Rules (CSRs).¹ A hearing concerning these appeals was conducted by Bruce A. Plotkin, Hearing Officer, on April 11, 2016. The Agency was represented by Natalia Ballinger Assistant City Attorney, while the Appellant represented herself. Agency exhibits 1-17 were admitted. Appellant's exhibits A, I, and X were admitted. The following witnesses testified for the Agency: Clerk and Recorder Debra Johnson, Mr. Leroy (Eddie) Gurrola, Ms. Tracy Steers, Recording Manager Richard Dewar, and Deputy Clerk and Recorder Juan Guzman. The Appellant testified on her own behalf, and presented the testimony of Ms. Bridget Svalberg and Ms. Lisa Sandoval.

Appellant asserted her discipline was unlawfully discriminatory based on her religion, age, and political affiliation. She also claimed her suspension and transfer were unlawfully harassing and were retaliatory actions in response to her whistleblowing reports of: (1) unpaid, off-duty work by a co-worker, (2) a former supervisor's demand for that unpaid work, and (3) a conflict of interest in the Agency's re-hiring of Appellant's previous supervisor after her resignation.

II. ISSUES

The following issues were presented for appeal:²

- A. whether the Appellant violated any of the following Career Service Rules: 16-60 A; B; E; J; K; L; M; or O;
- B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to suspend her for 10 days conformed to the purposes of discipline under CSR 16-10;
- C. whether the Agency based its discipline on unlawful religious, age, or political affiliation discrimination;
- D. whether the Agency's unlawfully harassed Appellant, based upon her religion, age, or political affiliation; and
- E. whether the Agency's retaliated against Appellant for alleged whistleblower conduct.

¹ The Career Service disciplinary rules were revised and renumbered, effective February 12, 2016. Since the violations alleged in this appeal occurred before that date, this Decision is based upon, and refers to, the prior version and numbering of the rules.

² Appellant claimed the Agency retaliated against her in violation of Denver's Whistleblower Protection Ordinance, DRMC sec. 2-106 *et seq.* All but one of her alleged whistleblower actions were dismissed prior to hearing as untimely. Order dated April 7, 2016.

III. FINDINGS

A. Background.

The Appellant, Tenaj Tannenbaum, has been employed by the Agency since 2007. Customer service, both external and internal, is of paramount importance to the highly customer-centric Agency. To that end, treating co-workers with the utmost respect is highly emphasized. [Exhibit 2-13; 3-14; 10-1; 10-2; 11; Guzman Testimony; Johnson testimony]. The Agency assessed discipline in this case based on the following incidents.

B. Appellant's tone with co-workers and with a supervisor in follow-up meeting.

On November 25, 2015, the head of the Agency, Clerk and Recorder Debra Johnson, overheard part of an exchange between Tannenbaum and two co-workers. Johnson did not hear what words were exchanged but was concerned about Tannenbaum's elevated, abrupt tone, particularly since the area is open to customers who can see and hear such interactions.

Johnson shared the incident with Tannenbaum's direct supervisor, Richard Dewar, Recording Manager. They convened a meeting five days later, November 30, 2015, with Tannenbaum. Johnson told Tannenbaum she did not hear what words were exchanged, but was concerned about the tone of the November 25th interaction, stated her expectations how employees should treat each other, and related that she found Tannenbaum was loud, rude and disrespectful toward coworkers.

In Tannenbaum's written recollection of the meeting, she replied by accusing Johnson of being "perennially obnoxiously loud, unprofessional and rude." She told those assembled that Johnson's rudeness includes "tossing the 's-word' around, even when customers are present." Tannenbaum added Johnson hates her, that the meeting was 'persecution,' and that she "would not stand for it." [Attachment to appeal]. Tannenbaum told Johnson "you're full of it," and said Johnson hates her. [Johnson testimony; Dewar testimony; Exhibit 5; Exhibit 6]. Johnson asked if there were anything else, to which Tannenbaum "retorted that as she [Johnson] was the one who had called the meeting, I wanted to know from her if there were anything else. Apparently no, and I left." [Attachment to appeal].

After the meeting, Tannenbaum immediately contacted Gurrola to find out what he said to Johnson. Then she called the other co-worker, to ask that co-worker's opinion of her [Tannenbaum's] behavior. [Id].

C. Customer satisfaction rating unit.

With a view toward measuring customer satisfaction, the Agency installed customer feedback devices at each customer service station in December 2014. Each staff member was notified by email about the rollout, [Exhibit 11], and received a short training session on the operation of the units. [Id., Guzman testimony; Johnson testimony]. Staff were instructed to invite each customer, at the end of their interaction, to rate the service they just received by pushing one of five buttons on the customer feedback device which is set up to screen customer input from the staff member. The choices on the customer feedback units are "Excellent," "Good," "Acceptable," "Poor," and "Unacceptable." The feedback is used to improve customer service and the feedback also counts toward work review ratings (PEPRs). [Exhibit 11]. When Tannenbaum transferred to the Recording Division, Dewar specifically advised her that her performance would be based, in part, on survey responses by "over-the-counter in-person feedback." [Exhibit 4-3]. No evidence was presented what staff was supposed to do if the customer failed to make an entry. The rollout, training, and Dewar's instructions to Tannenbaum did not specifically prohibit staff from entering their own rating if the customer failed to do so.

On December 3, 2015³, Guzman observed Tannenbaum at her work station pressing the customer satisfaction rating unit following a customer interaction. Guzman asked Richard Dewar,

³ The notice of discipline, Exhibit 2, was dated December 31, 2016, an obvious typographical error, since no DeLorean was seen in the vicinity.

Tannenbaum's immediate supervisor, to review past recording from the overhead security camera⁴ above Tannenbaum's desk to determine if this was an isolated incident. Dewar checked the previous month and found 12 instances⁵ where Tannenbaum entered her own customer satisfaction rating after customers left her counter. [Exhibit 2-5; Dewar testimony; Johnson testimony].

A meeting in contemplation of discipline was convened by the Agency on December 22, 2015. Tannenbaum attended with her representative, Mr. Ed Bagwell. At the meeting, Tannenbaum stated she observed another employee rating himself.

On December 31, 2015, the Agency sent its notice of suspension to the Appellant. This appeal followed timely on January 11, 2016.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR §19-10 A.1.b., as a direct appeal of a suspension. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

This case contains a mixed burden of proof. The Agency retains the burden of persuasion, throughout the case, to prove the Appellant violated one or more cited sections of the Career Service Rules, and to prove the degree of discipline complied with CSR 16-20. The Appellant retains the burden of persuasion, throughout the case, to prove the Agency engaged in unlawful discrimination, harassment or retaliation. The standard by which the moving party must prove its claims is by a preponderance of the evidence.

C. Career Service Rule Violations

1. **CSR 16-60 A. Neglect of duty.**

To sustain a violation under CSR 16-60 A, the Agency must establish Tannenbaum failed to perform a duty known to her. In re Gomez, CSA 02-12 (5/14/12), citing In re Abbey, CSA 99-09, 6 (8/9/10). The Agency claimed the Appellant violated this rule by her unprofessional, disrespectful, and rude responses to Johnson during their November 25, 2015 meeting. [Guzman testimony].

While Tannenbaum's accusations, words and behavior toward Johnson were improper and violated other rules as found below, the Agency failed to cite what duty was communicated for which of Tannenbaum's actions established a violation. In the absence of the Agency's statement of a duty, none will be inferred by the Hearing Officer. No violation was established for Tannenbaum's outburst on November 25, 2015.

The Agency also alleged Tannenbaum violated this rule when she rated her own service as excellent by entering that rating on a device intended to be used only by customers. For reasons stated below, the Agency established, by a preponderance of the evidence, that employees who worked at customer service counters, including Tannenbaum, had a duty to ask each customer to enter their feedback into the customer feedback unit, a device used to gather customer reviews of their transactions with the Agency employees. In view of the purpose of the devices, which purpose was communicated to all affected employees including Tannenbaum, she also had an evident implied duty not to skew the customer satisfaction results by entering her own rating. Her failure to solicit customer feedback, as seen

⁴ For the security of employees and the public alike, cameras were placed some years ago above every station where cash is handled. [Dewar testimony].

⁵ Exhibit 17; Exhibit 13-2 through 13-24].

in 24 video recordings, and her self-rating, as seen in those same recordings, breached both those duties, and therefore violated CSR 16-60 A.

2. CSR 16-60 B. Carelessness in performance of duties and responsibilities.

While CSR 16-60 A) and CSR 16-60 B), share similar elements of proof, they are distinguished in that, under 16-60 B., it is the Appellant's acts (performance), rather than her omissions (neglect), which are reviewed. See In re Simpleman, CSA 31-06, 4-5 (10/20/06). Thus, a violation under this rule occurs for performing poorly, rather than neglecting to perform, an important duty.

Guzman alleged Tannenbaum violated this rule by failing to solicit customer feedback, as stated immediately above, and by falsifying data for customer service. Tannenbaum's occasional compliance with her responsibility to solicit customer feedback was a substandard performance of that responsibility, in violation of this rule. Tannenbaum's protest that others violated the responsibility applies to the degree of appropriate discipline, but not to whether a violation occurred.

3. CSR 16-60 E. Any act of dishonest, which may include, but is not limited to:

1. Altering or falsifying official records or examinations.

3. Lying to superiors or falsifying records with respect to official duties, including work duties, disciplinary actions, or false reporting of work hours.

A violation of this rule occurs when an employee knowingly provides incorrect information in the employment context. In re Clayton, CSA 111-09, 4 (4/16/10). Guzman stated Tannenbaum intentionally falsified the rating of her customer service by entering her own rating into the customer feedback unit. Tannenbaum acknowledged her supervisors viewed video clips of her rating her own customer service 12 times. [Exhibit O]. She did not deny understanding the purpose of the device was to elicit customer feedback, and did not deny receiving training regarding the purpose and process to elicit such feedback as stated by the Agency. Under those circumstances, Tannenbaum knew that entering her own rating was a knowing misrepresentation. Her explanations that others did the same thing and that someone else was authorized to enter their own ratings were unpersuasive for reasons stated below. The Agency, therefore, proved Tannenbaum's entering her own customer service rating was a violation of this rule.

4. CSR16-60 J. Failing to comply with the lawful orders of an authorized supervisor or failing to do assigned work which the employee is capable of performing.

The Agency's allegations under this rule relate to the customer feedback unit. The Agency alleged Tannenbaum self-reported "excellent" customer interactions at least 12 times in a month on a device intended to be used only by customers to rate their level of satisfaction with Agency employees who work at the customer service counters. Tannenbaum claimed three defenses to the accusations: everyone else rated themselves; Guzman told Gurrola the practice was acceptable, then Gurrola relayed that information to her; and there was no specific prohibition against the practice. Tannenbaum's claims were unpersuasive for the following reasons.

a. It is not a defense to a violation of a Career Service Rule that others also violated the rule.

Tannenbaum claimed Gurrola also violated the rule. However, Gurrola was disciplined for the practice. [Gurrola testimony]. Svalberg entered her own customer service rating some 10 times, [Svalberg testimony], but she was counselled and warned about the practice. Tannenbaum also claimed "virtually everyone else has [entered their own customer satisfaction ratings] as well," however she provided no support for that blanket claim, and Svalberg testified she was aware of only one other person who did so. [Svalberg testimony].

With regard to the varying degree of discipline received by the three employees known to have engaged in the practice – Tannenbaum, Gurrola and Svalberg - that matter applies to the degree of discipline, which I address below. It is unrelated to the issue of wrongdoing.

b. Gurrola denied Guzman told him it was acceptable to enter his own customer satisfaction result, [Gurrola cross-exam]. Gurrola's testimony was as credible as Tannenbaum's accusation to the

contrary, because: no evidence was adduced why Guzman might approve such a practice in violation of the purpose of the devices he introduced; and Gurrola's outraged denial of the accusation during cross-examination so markedly departed from his otherwise-mild mannered testimony, that it suggested some additional credibility based on an immediate, unfiltered response akin to the "excited utterance" exception to the rule against hearsay. Colorado Rules of Evidence 803(2).⁶

- c. The customer feedback units are set on counters in front of employees facing away from them, the buttons are shielded from the employees' view, and employees were specifically notified the devices were installed to obtain feedback from customers.
 - d. In at least six of the video clips [Exhibits 13-2, 13-8, 13-16, 13-20, 13-22, 13-23] showing Tannenbaum entering her own "excellent" rating, she looked both directions, with no customer or supervisor visible in the video recording, before pressing the "excellent" button. I interpret her looking both directions as a furtive gesture to ensure no supervisor or customer sees her, which, in turn, indicates Tannenbaum understood she was not supposed to engage in that action.
 - e. In regard to Tannenbaum's claim that Guzman approved self-reporting to Gurrola, both Guzman and Gurrola denied it. [Guzman testimony; Gurrola testimony]. Their credibility was not questioned in that regard.
 - f. As it relates to Tannenbaum's assertion that the Agency did not specifically prohibit self-rating, common sense dictates that employees know they should not enter their own ratings when: they were informed the purpose of the devices is to elicit customer feedback; the devices were set up to shield input from the employees' view; they were trained to invite each customer to enter such feedback; and none of the training or information provided about the devices indicated it was acceptable to enter their own feedback.
 - g. Finally, with respect to Tannenbaum's allegation that customers' babies sometimes inadvertently press the customer service buttons, that allegation bears little relevance to Tannenbaum's wrongdoing. If Tannenbaum were concerned about an error in feedback, it would be a simple matter to address it with a supervisor. [See Guzman testimony]. As justification for Tannenbaum to enter her own feedback, presumably as a kind of corrective measure for a stray baby's elbow, this reasoning was unconvincing.
5. **CSR 16-60 K. Failing to meet established standards of performance including either qualitative or quantitative standards.**

"Your 2015 PEP states [in] relevant part:"

Customer Service – Provide the public attorneys, title companies, and other interested parties with general or/or explanatory information; explain and clarify rules, processes, and procedures; answer questions and resolve a variety of problems within a defined scope, Exercise courtesy, tact, helpfulness and pleasantness in interacting with all customers, (internal and external) that are involved with the Office of the Clerk and Recorder Public Trustee's Division, Display a high level of effort and commitment toward exemplary quality service in satisfying every customer's expectations (Internal and External), answer, screen, and route telephone calls; take messages and provide detailed answers for phone inquiries, have contact with the public or employees where factual information relative to the organization or its function is received and relayed or a service rendered according to established procedures or instructions. Exercise confidentiality and refrain from contribution to rumors and innuendo. Must be able to

⁶ The point here is that Gurrola appeared to be reacting spontaneously to an unexpected accusation, as opposed to reacting to the events of November 25, 2015. See Lancaster v. People 615 P.2d 720 (Colo. 1980) ("what is of critical significance to *res geste* is the spontaneous character of the statement and its natural effusion from a state of excitement"). *Id* at 723. This observation is only of secondary significance to my finding.

work and be a part of team environment.

[Exhibit 2-1, 2-2].

The Agency claimed Tannenbaum violated this rule by failing to solicit customer feedback and, instead, entering her own customer service ratings. While the above portion of Tannenbaum's PEP addresses customer service generally, there were more specific allegations under other rules which applied to Tannenbaum's self-rating. The notice of discipline failed to provide meaningful notice of the connection between Tannenbaum's self-rating and the above-referenced PEP standard. Thus, no violation is found here.

6. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules. The Agency claimed the Appellant violated the following written policies.

Customer Service

The office of the Clerk and Recorder treats the subject of customer service very seriously. Each transaction within the Clerk and Recorder requires either interaction with a member of the public, interaction with other city representatives, or interaction with a co-worker. Superior customer service must be provided at all times. Superior customer service includes, but is not limited to, providing service with a smile, being courteous and respectful, and being helpful. Superior customer service includes promptly acknowledging all customers and inquiring whether the customer requires assistance. If the customer requests assistance, the employee shall assist the customer or direct the customer to, and /or affirmatively locate and/or communicate with, another employee who may be able to assist the customer. Customer service does not include any act of rude behavior or disrespect. Each staff member of the Clerk and Recorder is expected to offer kind and courteous service to customers who personally visit the agency, to customers who call in to make inquiries regarding agency services, to representatives from other city agencies, as well as to your co-workers. Any conduct to the contrary may subject the employee disciplinary action up to and including dismissal.

[Exhibit 2-2, *citing* Clerk and Recorder Employee Handbook, Exhibit 3-13].

Supervision, Office Decorum and Professionalism

Each department within the Clerk and Recorder is managed by a director, deputy director, supervisor or manager. Although each manager is responsible for staff and issues within his or her respective section, in the absence of a department manager, the remaining managers have discretion to direct staff members who are not within their direct line of supervision. Staff members are expected to conduct themselves, and interact with others, in a professional and respectful manner to include, but not limited to, customers, co-workers and Managers. Abusive, rude disruptive and/or disrespectful attitude and behavior will not be tolerated and will subject the employee to disciplinary action.

[Exhibit 2-2, *citing* Clerk and Recorder Employee Handbook, Exhibit 3-14].

Supervision, Office decorum and Professionalism

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to, customers, co-workers and Managers. Abusive, rude, disruptive and/or disrespectful attitude and behavior will not be tolerated and will subject the employee to disciplinary action. Staff members shall not be insubordinate to any director, deputy director, supervisor or manager at any time. Insubordination includes, but is not limited to, the willful failure to perform one's job duties, failure to follow the chain of command, etc. Any employee engaging in insubordinate behavior shall be subject to disciplinary action up to and including dismissal.

[Exhibit 2-2, citing Clerk and recorder Employee Handbook, Exhibit 3-14].

These written policies oblige Agency employees to be kind and courteous not only to external customers, but to co-workers as well. The policies emphasize a prohibition against abusive, rude, and disrespectful attitude and behavior. Such requirements may not be used in bludgeon-like fashion to punish employees for ordinary disputes that inevitably arise in the workplace. [In re Strasser, 44-07A, 2 (CSB 2/29/08); *See also*, In re Freeman, 40-04, 75-04, 6 (3/3/05)]. However, conduct which would reasonably be expected to provoke outrage, or is substantially outside the range of petty disputes between co-workers is encompassed under this rule.

Insubordination is the willful failure to follow a chain of command, or willful failure to follow a supervisor's lawful order. [*See generally*, INSUBORDINATION, Black's Law Dictionary (10th ed. 2014)]. While the evidence proves Tannenbaum was discourteous, rude and even threatening to her supervisor on November 30, 2015, there was no evidence she willfully failed to follow a directive or failed to follow her chain of command. The Agency failed to establish that Tannenbaum was insubordinate to her supervisor on November 30, 2015. No violation, therefore, is established here.

Tannenbaum received notice of the policies above, and was trained in their implementation. For reasons stated above, Tannenbaum's outburst on November 30, 2015, including accusing the Agency head of being "full of it," exceeded the bounds of petty disputes, and were discourteous and threatening to her supervisor. This conclusion is buttressed by the purpose of the meeting, to address Tannenbaum's tone toward other co-workers five days earlier. The Agency proved, by a preponderance of the evidence, that Tannenbaum defied specified Agency policies above, in violation of CSR 16-60 L.

The Agency also alleged Tannenbaum's interaction with Sandoval on November 25 violated these provisions as they relate to maintaining respect toward co-workers. However, Sandoval testified she did not find Tannenbaum to be inappropriate, only that she struggled to keep Tannenbaum on task. Sandoval stated Tannenbaum was frustrated over unrelated issues but nothing Tannenbaum said caused her to feel offended. [Sandoval testimony]. Her written recollection of her interaction with Tannenbaum on November 25th did not mention any problem with Tannenbaum's tone or attitude toward her. [Exhibit 8]. Sandoval's testimony was credible, not questioned, and therefore rebuts the Agency's accusation. No violation is established under this rule as it pertains to Tannenbaum's interaction with Sandoval on November 25, 2015.

Gurrola testified Tannenbaum was demeaning and condescending toward him on November 25, 2015. His testimony was credible and Tannenbaum failed to raise substantial doubt that he testified other than honestly and accurately. Moreover Tannenbaum stated Gurrola is one of only two co-workers she considers a friend at work. [Exhibit 6]. During Gurrola's testimony, he referred to Tannenbaum with reverence, stating he would approach her when he had questions about procedure. In addition, on the date Tannenbaum berated him, Gurrola stated he was fairly sure what to do, but simply wanted a second opinion from Tannenbaum. Gurrola strongly denied anyone instructed him to make accusations in his report of his interaction with Tannenbaum on November 25th. [Gurrola testimony; Gurrola cross-exam].

All these factors indicate Gurrola had no reason to invent wrongdoing toward him by Tannenbaum. Thus, Gurrola's recollection that Tannenbaum was demeaning and condescending to him on November 25, 2015, was more credible than Tannenbaum's denial. Such behavior was rude and disrespectful in violation of the Agency's Handbook, [Exhibit 3-14], regarding office decorum and professionalism.

Johnson, and Dewar both wrote their recollection of the November 30, 2015 meeting with Tannenbaum the same day. The accounts were entirely consistent, and Tannenbaum's written account of the meeting corroborated the most significant portions of the accounts by Johnson and Dewar, to wit: in response to charges that she used an unprofessional tone with a co-worker, Tanenbaum never addressed the accusation, but instead described how outraged she felt, accused the head of her agency of persecution, told her "I won't stand for it," without foundation accused the head of the agency of being threatening and, when the head of her agency, with evident restraint, asked Tannenbaum if she had any other grievance, described her agency had as having "the temerity to ask if there were anything else." [Exhibit K]. In short, Tanenbaum's written summary of the meeting made it evident she believed that alleged (and unsubstantiated) wrongdoing by Johnson justified her own misbehavior. Moreover, immediately after the meeting she approached the co-workers who reported Tannenbaum's unprofessional behavior and insisted on knowing what they said. Unsurprisingly under those circumstances, both told her they had not reported any impropriety by Tannenbaum.

As part of our continuing effort to deliver an outstanding and memorable customer experience, we are excited to officially launch our customer feedback units. Every customer-focused station now has a small customer feedback unit that allows a customer to provide instant feedback as to the level of service received. The feedback options include:

- Excellent – Rating of 5
- Good = Rating of 4
- Acceptable = rating of 3
- Poor = Rating of 2
- Unacceptable = Rating of 1

At the conclusion of each transaction, we request that you solicit feedback as to the service received prior to closing your QMatic ticket.

For example...

1. How would you rate the service you received today? Thank you for your time!
2. We value your feedback, would you mind telling us how we did today? Thank you for your time!

A brief in-person training will take place this afternoon within each department work area. Customer service is a key focus area of our agency mission and overall success. The customer feedback will help improve our services and allow us to recognize our team members for outstanding service in this key area.

[Exhibit 11].

Threats and Violence

Staff members must not engage in intimidation, threatening or hostile behaviors, physical assault, vandalism, arson, sabotage, unauthorized use of weapons, carrying weapons onto Agency premises (no exception is made for legal carry and concealed weapons), or any other act, which, in management's opinion is inappropriate to the workplace. In addition, staff members must refrain from making bizarre or offensive comments regarding violent events and/or behavior. Staff members are expected to report any prohibited conduct to their supervisor. Staff members should directly contact proper law enforcement authorities if they believe there is a serious threat to the safety and health of themselves or others.

[Clerk & Recorder Employee Handbook page 10].

Juan Guzman, the disciplinary decision maker, testified he found Tannenbaum violated this portion of the Agency's Employee Handbook based on feedback from Johnson about the November 30th meeting. Johnson's report about the incident, which she wrote the same day, described Tannenbaum turning toward her "in a threatening manner." In testimony, Johnson added she felt threatened and intimidated by Tannenbaum's "rant." [Exhibit 5; Johnson testimony].

Tannenbaum replied that no one told her the November 30th meeting was intended as a counselling session, and Johnson did not testify that she or anyone else made clear the nature of the meeting. Thus, Tannenbaum's sense of defensiveness was understandable. Nonetheless, her reactions, largely acknowledged in her own written recollection and testimony, were inexcusably threatening and hostile in violation of this Agency policy.

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

Gurrola's testimony that Tannenbaum was demeaning toward him on November 25th, and made him feel stupid for asking questions was intimidating and abusive behavior by Tannenbaum in violation of this rule. Tannenbaum's denial did not rebut Gurrola's credible testimony.

During her meeting with Johnson and Dewar on November 30, 2015 to discuss Tannenbaum's alleged unprofessional treatment of co-workers, Tannenbaum's responses to the Agency's highest officer, included "you're full of it," [Exhibit 6], accused Johnson of being "the most unprofessional person in the Agency," [Exhibit 5], and telling Johnson, "I do not want to hear of this again," [Exhibit 6]. Johnson credibly testified she felt intimidated and threatened by Tannenbaum's tone and accusations. While Tannenbaum's words were not inherently threatening, Johnson provided credible testimony that the manner in which they were delivered was threatening, and Dewar's statement about the incident tended to affirm Johnson's recollection. Taken together, those pieces of evidence prove Tannenbaum's accusations toward Johnson on November 30, 2015 were intimidating, threatening and abusive in violation of CSR 16-60 M.

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

Tannenbaum alleged that, since Johnson could not remember any of the conversation between her (Tannenbaum) and Gurrola, on November 25, 2015, Johnson had no basis to claim her tone was inappropriate. Irrespective of Johnson's allegations, Gurrola, whose credibility Tannenbaum did not challenge, recalled clearly that Tannenbaum was demeaning and made him feel stupid. [Exhibit 7; Gurrola testimony]. Despite that interaction, Gurrola described his subsequent working relationship with Tannenbaum as "good," and described their ongoing weekly preparation for auctions in positive terms. The Agency failed, therefore, to establish that Tannenbaum did not maintain a satisfactory working relationship with Gurrola as a result of her demeaning comments to him on November 25, 2015.

The Agency also alleged Tannenbaum's disrespectful intercourse with Johnson, during their November 30, 2015 meeting, was a violation of this rule. [Guzman testimony]. However, Johnson did not claim her working relationship with Tannenbaum suffered as a result of Tannenbaum's outburst, and no other evidence supported such a conclusion. Thus, as here, even when an employee engages in a hostile outburst against a co-worker, City employee, or member of the public, the outburst, alone, without evidence of an adverse impact on the working relationship, fails to establish a violation of this rule.

V. APPELLANT'S CLAIMS

Tannenbaum claimed the Agency discriminated against and harassed her based on her religion, age, and political affiliation, and also claimed the Agency retaliated against her for an ethics complaint she filed against a former supervisor on December 14, 2015.

Colorado has adopted the burden-shifting test first announced in McDonnell Douglas v. Green, to

establish a prima facie case for discrimination. 411 U.S. 792 (1973); Bodaghi v. Department of Natural Resources, 969 P.2d 718 (Colo. Ct. App. 1998) (rev'd on other grounds). Intentional discrimination is proven by evidence of (1) membership in a protected class, (2) an adverse employment action, and (3) evidence which supports an inference of discrimination. Tannenbaum's suspension satisfied the second element of an adverse agency action for all three claims.

A. Religious Discrimination

In her initial appeal attachment, Appellant stated she is a Catholic. As a Catholic, Appellant established her membership in a protected class.

With respect to an inference of discriminatory intent, the only pre-hearing evidence presented regarding religious discrimination was Tannenbaum's hypothetical question about her duties to Guzman, "What if I have an objection to marrying gays?" Tannenbaum never asked for an accommodation and never objected to her transfer. Moreover, there was no evidence presented that she was ever asked to issue a marriage license to a homosexual couple in alleged violation of her religious beliefs, nor was there any evidence at all that she was asked to do anything she found against her religion in the course of her employment. Johnson, Dewar and Guzman denied knowing what religion Tannenbaum follows. [Johnson testimony; Dewar testimony; Guzman testimony]. Under those circumstances, Tannenbaum failed to establish an inference of discriminatory intent based on her religion. Her religious discrimination claim fails.

B. Age Discrimination

Both Johnson [the Agency head] and Guzman [the decision maker] testified they had no knowledge of Appellant's age, did not ask her about it, and did not discuss it. [Johnson testimony; Guzman testimony]. Tannenbaum did not provide her age, and presented no credible testimony that made it more likely than not she or anyone else conveyed such information. She did not present any testimony to support her claim of age discrimination during her case in chief, nor did she cross examine the Agency's witnesses concerning any aspect of her age discrimination claim. In view of the dearth of evidence linking any adverse agency action to her age, Tannenbaum's age discrimination claim fails.

C. Political Affiliation Discrimination

Tannenbaum's basis for political affiliation discrimination was her claim that a former co-worker "undoubtedly" conveyed Tannenbaum's political and religious preferences to Johnson. Even if true, Tannenbaum failed to establish that Johnson conveyed or persuaded the decision maker, Guzman to assess discipline in consequence of Johnson's alleged discriminatory animus. Moreover, Johnson testified she never talked with Tannenbaum about her political affiliation and was unaware what affiliation she might have. Johnson denied the co-worker named by Tannenbaum conveyed Tannenbaum's political affiliation. [Johnson testimony]. Guzman testified credibly he did not consult with Johnson about charges or penalties in this case. Tannenbaum, therefore, failed to establish that any charge or penalty was based upon her political affiliation.

D. Harassment.

Tannenbaum also claimed she has been harassed in increasing degree based on her religion and age. For reasons stated above, no age-based harassment was found. Regarding her claim of religiously-based harassment, Tannenbaum cited her transfer from the Public Trustee's Office to the Recording Division. She specified that, during a September 21, 2015 meeting, during which Guzman and Dewar announced her transfer, she made it clear that, as a Catholic, she objected to issuing gay marriage licenses, but Guzman, according to Tannenbaum, replied she was required to comply "or else." [Appeal attachment].

First, federal law, state law, and the courts, prohibit public accommodations such as the Clerk and Recorder's Office from refusing service based on sexual orientation. Colo. Anti-Discrimination Act, C.R.S. sec. 24-34-301 through 803 (2014); Craig v. Masterpiece Cakeshop, 14CA1351 (Colo. App. 8/13/15),

citing Obergefell v. Hodges, 576 U.S. _____, 135 S. Ct. 2584 (2015). The Colorado Court of Appeals stated the prohibition against discrimination, while compelled by the government, is not sufficiently expressive to warrant First Amendment protections, as claimed by Tannenbaum. The Cakeshop court stated baking a wedding cake for same-sex couples does not express a celebratory message about same-sex marriage. *Id.* at 46-49. Similarly, verifying a same-sex couple's information and issuing them a marriage license is not a celebratory message, merely fulfilling one's duty as an employee of the Clerk and Recorder's Office. Tannenbaum remains free to disassociate herself from her customers' views. See *Id.* at 49. The law does not compel Tannenbaum to support or endorse any views contrary to her religion, but merely prohibits employees like her, in places of public accommodation, from discriminating against customers on account of their sexual orientation. *Id.* at 51. In short, Tannenbaum's right to espouse her religious beliefs, including her opposition to same-sex marriage, does not extend to disregard the clear constitutional rights of other citizens. *Id.* at 52, 53, citing Newman v. Piggie Park Enterp's., Inc., 256 F. Supp. 941, 945 (D. S.C. 1966) (add'l citations omitted).

Second, Chief Deputy Clerk and Recorder Juan Guzman, whose credibility was not questioned, testified he requested Tannenbaum's transfer based on two recent and unexpected vacancies, and Tannenbaum's knowledge of the tasks and ability to take on the new assignment.

Guzman further testified he was unaware of Tannenbaum's religion, political beliefs, and age, and avowed the transfer was not punitive. Moreover, Guzman testified without rebuttal that, when Tannenbaum asked, "What if I have a religious objection to issuing marriage licenses to gays?" Guzman replied the Agency was required to follow the law, but the specific answer was outside his area of expertise. He suggested Tannenbaum contact the Office of Human Resources. Guzman stated he believed she never did, she did not object to the transfer, did not request any accommodation, and never mentioned any objection again. [Guzman testimony]. Guzman's testimony establishes a valid business reason for Tannenbaum's transfer, and legal basis for requiring her to issue marriage licenses irrespective of sexual orientation. Tannenbaum's duties did not include conducting marriages, only issuing licenses.

Finally, Tannenbaum's classification, pay and benefits remained unchanged after her transfer. Under the totality of the circumstances, Tannenbaum failed to establish, by a preponderance of the evidence, that her transfer was harassing behavior based on a protected status. Tannenbaum failed to prove any of her claims.

E. Whistleblower Retaliation

A claim under the Whistleblower Protection Ordinance is established by allegations that (1) a supervisor imposed or threatened to impose; (2) an adverse employment action upon an employee; (3) on account of the employee's disclosure of information about any official misconduct, to any person. In re Wehmhoefer, 02-08, 4 (2/14/08).

Tannenbaum claimed the Agency retaliated against her for her December 14, 2015 ethics complaint concerning a former supervisor. Tannenbaum alleged the former supervisor contracted with the Clerk and Recorder's Office less than three months after her resignation, in violation of the City's six-month prohibition on subsequent employment with the City. [Denver Code of Ethics, DRMC § 2-51 *et seq.*] Her complaint was not sustained. [Tannenbaum testimony].

The Agency rejected Tannenbaum's whistleblower claim on timeliness grounds, stating her discipline was assessed December 8, 2015, six days before she filed her own ethics complaint. [Exhibit. 1]. However, the Agency's letter in contemplation of discipline, issued before Tannenbaum's complaint, could be found to be a threat of discipline in violation of the Whistleblower ordinance. Nonetheless, a whistleblower retaliation claim cannot be sustained without persuasive facts to support the claim. In re Macieyovski, 28-14, 9 (10/13/14); see also In re Harrison, 55-07, 68 (6/17/10). Tannenbaum presented no facts to support her claim other than her belief that her suspension was somehow motivated by her ethics complaint. Accordingly, Tannenbaum failed to prove this claim.

VI. DEGREE OF DISCIPLINE

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

A. Severity of the proven offenses

Making hostile, personal attacks against any co-worker, let alone the head of one's agency, in response to a work-related concern, is indefensible and, alone, could well justify termination. Even without Johnson's credible testimony, Dewar's contemporaneous description of Tannenbaum's behavior at their November 30th meeting, his testimony, and Tannenbaum's own evidence, all corroborated Johnson's claims. Even if Johnson had been incorrect in her assessment that Tannenbaum's tone toward her co-workers on November 25th was unprofessional, Tannenbaum's reaction toward Johnson was unjustified and caused legitimate concern about her hostility.

In regard to Tannenbaum's claim that her discipline was disproportionate to two other employees who entered their own customer satisfaction ratings, both were also admonished by the Agency. Gurrola received a written reprimand. The Agency was entitled, and indeed, required under these Career Service rules, to assess a relatively light discipline, based upon Gurrola's immediate acknowledgement of this actions, acknowledgment that it was wrong, and evident willingness to correct the behavior, [Guzman testimony].

Also unlike Tannenbaum, Brigitte Svalberg, who also entered her own customer service ratings, approached her supervisor to admit she had pressed her own customer service device button, and acknowledged it was wrong. The Agency was justified in considering she came forward, acknowledged her action was wrong, and, unlike Tannenbaum, made an immediate commitment to cease the action. [Guzman testimony; Svalberg testimony].

B. Prior Record

Less than one year earlier, Tannenbaum received a verbal reprimand for inappropriate comments toward a different supervisor. Similar misconduct toward two different supervisors in less than one year justifies a more significant penalty in the present case.

C. Likelihood of Reform

Since Tannenbaum remained steadfastly unconvinced that she did anything wrong throughout this case, including during hearing, it is unknown whether she will reform her behavior.

VII. ORDER

The Agency's December 31, 2015 10-day suspension of the Appellant's employment, along with its requirement that Appellant attend a communication course specified in the notice of discipline, is AFFIRMED.

DONE May 12, 2016.



Bruce A. Plotkin
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with the requirements that follow CSR § 19-60, within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the decision's certificate of delivery. The Career Service Rules are available as a link at 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

AND

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND

Opposing parties or their representatives, if any.