

DECISION AFFIRMING TWO-LEVEL DEMOTION WITH ATTENDANT LOSS OF PAY

KRISTI BURDETT, Appellant,

v.

DEPARTMENT OF FINANCE, DENVER MOTOR VEHICLE,
and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

The Appellant appeals her two-level demotion for alleged violations of specified Career Service Rules, and Agency rules, regulations and orders. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on December 12 and 13, 2017. The Agency was represented by Assistant City Attorneys Kristen Merrick and Ashley Kelliher, while the Appellant was represented by Louis Underbakke, Esq., of the law firm Louis L. Underbakke, P.C. The following Agency exhibits were admitted into evidence. 1-3, 5-9, 15, 17, 18, 20, 23-1 through 23-3, 23-5 through 23-9, 24, 25, 32-1, 32-2, 32-7 through 32-10, 33-36, 37-2, 37-3, 38, 39, 41, 43, 44, 46, and 48-52. Appellant's exhibits A-H, J-T, X, Z, AA, BB, FF-29 and FF-51 were admitted. The following witnesses testified for the Agency: Jason Salazar, Patti Anderson, Benjamin Chavez, Brenda Myrick, Amber Ross, Tommy Wilson, Laurel Bender, Stephanie White, Debbie Mason, and Illya Scott. The Appellant testified on her own behalf and presented the following additional witnesses: Brenda Olivas, Stacy Aragon, Jennifer Kelley-Sweet, and Louis Sakyi.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Appellant violated Career Service Rule (CSR) 16-29 A., G., I., R., or T.;
- B. if the Appellant violated one or more of the Career Services Rules, whether the Agency's decision in assessing a two-level demotion conformed to the purposes of discipline under CSR 16-41;
- C. whether retaliation was a contributing factor in the Agency's demotion of Appellant.

III. FINDINGS

Appellant has been employed by the DMV (Agency) since 1993. She became a branch manager in 2011. Her duties include cultivating a positive and supportive atmosphere for staff through coaching, mentoring, and encouraging staff to meet goals. With respect to citizens, her duties include being "on the floor," meaning to be visible to the public and staff and keeping apprised of exchanges between them. She is also responsible for complying with City fiscal rules. [Salazar testimony; Exh. 48]

The Agency served Burdett with a written reprimand in 2016 for demeaning conduct toward subordinates. [Exh. 1-2; Exh. 15; Exh. 48]. Burdett's supervisor developed a coaching plan to assist Burdett with her self-awareness and social skills, including providing exercises. Burdett met that plan with mixed results. [Exh. 25]. At the end of the plan in October 2016, subordinates reported Burdett did not spend any more time on the floor, and seemed unwilling to leave her office, even when it was very busy and subordinates needed assistance. That unwillingness resulted in subordinates having to go back and forth to Burdett's office resulting in additional wait times for customers. Moreover, subordinates were told only to look up the answer, and were refused training and time to prepare for required testing.

In January 2017, Burdett's supervisor met with Burdett to inform her that subordinates continued to report she was unwilling to assist on the floor, kept her door closed, did not support staff who feared going to her for help, and failed help a newer employee who was overwhelmed. Similar complaints were lodged in February by several subordinates.

On January 31, 2017, a staff member was given a \$20 bill as a tip from a customer. The employee immediately turned it in to Burdett, as required by the Agency's "Handling Monies Found in Offices" policy. Burdett responded by raising her eyebrows, groaning and complaining "now I have to turn it in and figure out how to deposit it," although Burdett attended a manager's meeting only two weeks earlier that addressed that very issue, and a recent policy notice had issued directly on point. No record was found of the deposit of the \$20 as required under the policy and fiscal accounting rules.

On March 2, 2017, Burdett's supervisor requested her to explain why no vehicle title audit had been submitted since February 15 as is required daily with 48-hour deadlines. Burdett blamed a subordinate although it was ultimately her responsibility to ensure the audits are completed timely, and she should have become aware of the noncompliance by February 21 for titles processed on February 16. The subordinate was new to that role, and part of Burdett's duties include to provide support, training and guidance.

On March 6, 2017, the same subordinate complained to Burdett's supervisors that Burdett provided no clear direction on daily duties or who should perform them, no training how to conduct title audits, and his concern that Burdett would retaliate for his complaint. The same day, Burdett was placed on investigatory leave.

As a result of the lack of audit compliance, customers did not receive timely titles to their vehicles, staff at Burdett's branch and at the processing center spent unnecessary time searching for missing documents, customers were forced to return to the branch to request permit extensions due to the delay in processing their titles, and car dealers and banks received complaints from customers about their missing and untimely titles.

Also, during the investigation, the Agency discovered forms on Burdett's desk that should have been scanned into the data base daily, and also discovered a year tab and license plate that had no processing history to track their ownership or status. Although it was her responsibility, Burdett failed to take any action on 93 of 94 tabs and 45 registration receipts. The failure to process those items could have resulted in customers with incorrect or missing tabs being stopped by police and having their vehicles impounded. Burdett refused to provide study time for a subordinate to pass probation timely. A total of 10 employees complained about Burdett's conduct.

A meeting in contemplation of discipline was held on April 25, 2017. Burdett attended with her attorney. On May 4, 2017, the Agency served Burdett with a notice of involuntary demotion with attendant loss of pay, effective May 8, 2017. This appeal followed timely on May 19, 2017.

IV. ANALYSIS

A. Jurisdiction and Review.

Jurisdiction is proper under CSR 19-10 A.1.c., as the direct appeal of a demotion. 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.

The Agency retains the burden of persuasion, throughout the case, to prove Burdett violated one or more cited sections of the Career Service Rules, and to prove its decision to demote Burdett two levels complied with CSR 16-41. Burdett retains the burden of persuasion to prove the Agency engaged in unlawful retaliation. A preponderance of the evidence standard applies to each party's claim.

C. Career Service Rule Violations.

1. CSR 16-29 A. Neglect of duty or carelessness in performance of duties and responsibilities.

To sustain a violation under CSR 16-29 A., the Agency must establish that Burdett failed to perform a known duty. In re Gomez, CSA 02-12 (5/14/12), citing In re Abbey, CSA 99-09, 6 (8/9/10). The Agency's potential claims under this rule were also alleged under other, more specific duties, below. Consequently, no separate violation is found hereunder.

2. CSR 16-29 G.1. Failing to meet established standards of performance including either qualitative or quantitative standards.

As it pertains to the following:

PEP

Section 1 – Duties: Management and Leadership. Cultivate a positive and supportive atmosphere with administration, peers, citizens and subordinates. Motivates, coaches, mentors, and encourages staff to meet agency expectations and objectives. Actively promoting teamwork and professionalism in interactions with citizens, stakeholders and peers. Exhibits subject matter expertise as related to daily work, technical applications, fiscal processing, and all responsibilities. Constant managerial observations are done alone with the leadership staff by being “on the floor,” thus making continual awareness to both the public and the staff that management’s priority is the customer experience. Being “on the floor” affords management the opportunity to keep in tune to the messages and exchanges between staff and the citizens.

An extraordinary number of subordinates were fearful of Burdett, avoided approaching her, were belittled by her and, when approaching her even for urgent matters, were ignored, belittled, or rebuffed. [Salazar testimony; Anderson testimony; Chavez testimony; Myrick testimony; Ross testimony; Wilson testimony; Bender testimony; White testimony; Scott testimony;

Exhibits 10; 11; 13; 14; 16; 17; 21; 22]. Many complained Burdett refused to help on the floor even when they were extremely busy. [Chavez testimony; Myrick testimony; Bender testimony; Mason testimony; Scott testimony; Salazar testimony; Ross testimony].

Other than Burdett's unsubstantiated conclusion that these employees conspired against her, she provided no legitimate basis to rebut their credibility. Her actions undermined the obligation to provide and promote a positive and supportive atmosphere, and to coach, mentor and encourage her staff to meet agency expectations. Her acknowledged reluctance and widely-observed refusals to assist on the floor, [see paragraph immediately above], demonstrated a lack of professionalism, and led to multiple incidents of poor customer service.

Burdett provided testimony of several witnesses who found her accessible, [Aragon testimony; Kelley-Sweet testimony; Sakyi testimony].¹ Their testimony was consistent with frequent complaints that Burdett had favorites, [Sakyi cross-exam] and did not undermine the credibility of the many witnesses to her abuse.

Deputy Director Salazar, whose credibility was not impeached, and had no reason to undermine Burdett, testified extensively as to the large number of complaints he received about Burdett's comportment, and his ongoing, but failed attempts to coach her and provide several opportunities for her to improve. This claim is proven by a preponderance of the evidence.

Separately, the Agency claimed Burdett was responsible for training and supporting new employees but failed to do so. The Agency alleged new employee Tommy Wilson was inconsistent in his audits and continued to make serious mistakes. Due to Burdett's failure to support him, Wilson's probation was required to be extended. Another new employee, Kenny Edwards, also struggled with timely processing and received little or no training from Burdett. Due to Burdett's denying Edwards time for training, his probation was extended through no fault of his own, in violation of Burdett's PEP standard above. This claim, that Burdett failed to support her staff, is also proven by preponderant evidence.

The Agency's third allegation under this PEP standard was also based on Burdett's failure to support staff. Edwards provided over 100 unprocessed license plate tabs title receipts to Burdett dating back several months which were required to be processed within 48 hours. Burdett processed one of them and ignored the rest. The failure to link tabs and registrations could result in a citation to a driver who is pulled over and shows a registration that does not match the license plate tab. [Mason testimony]. Burdett's failure to oversee the unmatched tabs and registrations placed citizens in jeopardy of having holds placed on their driver's licenses. Consequently, Burdett failed to assist subordinates to meet Agency objectives in violation of this rule.

3. CSR 16-29 I. Failure to maintain satisfactory working relationships with co-workers and other individuals the employee interacts with as part of her job.

Salazar received so many complaints about Burdett that he thought he might have to replace the entire office. [Salazar testimony]. Subordinates came to him crying, unable to eat, and threatening to quit. He found their complaints credible, including those of Chavez, Padilla, Myric, Ross, Shultz and Edwards. [Id].

¹ Another witness for Burdett, Brenda Olivas, did not provide testimony relevant to this claim regarding Burdett's actions and behavior. Even the three witnesses in her favor at best claimed Burdett is misunderstood. Kelley-Sweet did not even work under Burdett at the Tremont location, where all the complaints arose. Sakyi's "endorsement" of Burdett was that he got along with her, even while acknowledging the myriad complaints about her by others.

Credible complaints by subordinates included restrictions on going to the bathroom, [Ross testimony], telling a subordinate "shut your mouth," [Id.], physically blocking a subordinate as if to fight, [Salazar cross-exam], and telling subordinates to "look it up yourself" instead of assisting or guiding them. The aforementioned conduct establishes a violation of CSR 16-29 I.

4. CSR 16-29 R. Conduct which violates the Career Service Rules, the City Charter, the Denver Revised Municipal Code, Executive Orders, written departmental or agency regulations, policies or rules, or any other applicable legal authority.

As it pertains to the following:

Fiscal Rule 3.4 – Receipts and Deposits/Cash Handling. All receipts arising from the collection of taxes, licenses, fees, fines, penalties, forfeitures or from any other source whatsoever by any officer or employee of the City and County or any department thereof in their official capacity or during the performance of any official duty, must be processed in accordance with procedures established by the Manager of Finance.

Exceptions to this rule must be documented and approved by the Manager of Finance.

The Department of Motor Vehicles (DMV) "Handling Monies Found in Offices" policy states "Any spare change or miscellaneous funds should be turned into management immediately. This must be done in the business date that the monies are found."

"State/Pulled Rejects" procedure: Step 3 – Branch Manager, Supervisor or Clerk III will make the determination as to action needed per stated reject reason on the date received or within 24 hours.

On January 31, 2017, a customer gave a \$20 tip to a staff member. [Exh. 1-7; Exh. 41]. In accordance with Agency policy, the staff member turned it in to Burdett who was responsible to account for the money. There was no subsequent record as to the disposition of the \$20.

Burdett claimed she did not recall receiving the \$20 tip from her subordinate, however security video recorded the employee accepting the customer's money, leaving her station, and going to Burdett's office at the time the employee stated. The preponderance of evidence establishes the receipt of a \$20 tip; as branch manager, Burdett was responsible to account for it under the above fiscal accounting rule [see also Exh 35; 36]. Her failure to do so was a violation of Fiscal Rule 3.4.

5. CSR 16-29 T. Conduct which is or could foreseeably (1) be prejudicial to the good order and effectiveness of the department or agency; (2) bring disrepute on or compromises the integrity of the City.

The same evidence which established Burdett's abuse of subordinates also establishes the good order and effectiveness of the Tremont DMV branch was prejudiced thereby, in violation of CSR 16-29 T.

In addition, Burdett failed to complete required audits of vehicle titles between February 15, 2017 and March 2, 2017 in violation of Agency requirements to complete title audits daily, with 48-hour deadlines. Burdett claimed she delegated that task to a subordinate who failed to complete the audits, [Exh. 1-8; Burdett testimony], but it was ultimately Burdett's responsibility to account for the titles. Her failure to do so was prejudicial to the effectiveness of the Agency in violation of CSR 16-29 T.

With respect to the Agency's "state/pulled rejects" claim, the notice of discipline alleged that, while Burdett was on investigatory leave, Salazar found 11 state-rejected vehicle title determinations on Burdett's desk that dated to January 2017 and had not been processed within 24 hours as required by policy. He assigned them to another branch manager to resolve, since Burdett left no indication what issues were pending. As a result of Burdett's lack of oversight, customers did not receive their titles timely, excessive time was spent by the Processing Center and other branch personnel to search for missing documentation, customers were obliged to make additional visits to the branch to request extensions of temporary permits due to the delay in processing their titles, and vehicle dealers and banks received complaints from customers about their titles.

Burdett replied that she was unable to process these documents because the Agency required her to be on the floor during peak times, leaving insufficient time to process the state-rejected titles. She also claimed she had been working on those rejects on March 6 when she was placed on investigatory leave, and some of the rejects came in when she was out on FMLA leave. [Appellant's Amended Pre-Hearing Statement].

Even assuming the facts were as claimed, Burdett's response fails to explain why all the rejected titles were not processed within 24 hours, as required by the Agency's policy, above. Moreover, she did not request assistance to process them, and did not mention her illness and inferably-overloaded work days until after the notice of discipline issued, raising additional credibility problems in her response. This claim is also proven by a preponderance of the evidence.

D. Appellant's Retaliation Claim.

A retaliation claim requires Burdett to establish (1) she engaged in a protected activity; (2) the Agency took an action that a reasonable employee would have found materially adverse; and (3) there is a causal connection between the protected activity and the adverse action. In re Koonce, CSB 36-13 (10/16/14); Metzler v. Federal Home Loan Bank of Topeka, 464 F. 3d 1164 (10th Cir. 2006).

Burdett's claimed protected activities, according to her appeal document, were "assisting the city in the investigation of complaints, filing an appeal of previous disciplinary action and contacting Cary Kennedy, CFO Deputy, with these concerns." [Appeal]. Burdett explained the Agency director saw her going into Kennedy's office without any evidence the Director was even aware of the topic of conversation. [Appellant Amended Pre-Hearing Statement, p. 4]. Burdett did not state what she discussed with Kennedy. No protected activity was stated. Consequently, no adverse action that relates to a protected activity can be established.

Next, Burdett claimed she received a "below expectations" annual work review [PEPR] in 2015, two months after her previous five-day suspension was reversed. The gap between the 2015 reversal of Burdett's suspension and the current discipline² is too remote to establish a causal connection between them. Anderson v. Coors Brewing, 181 F.3d 1171, 1179 (10th Cir. 1999).

The critical inquiry of the third element of retaliation is whether Burdett demonstrated the adverse action occurred under circumstances which give rise to an inference of retaliation. Temporal proximity is a relevant circumstance only if the adverse action followed very closely after the protected activity, which is, very evidently, not the situation here. Anderson. In addition, Burdett waived any claim she may have had. She stated she considered filing a

² Burdett's "below expectations" claim from 2015 is not an issue in the current case.

retaliation claim at the time, but dropped it “because it was too stressful for me at that time.” [Appellant Amended Pre-Hearing Statement, p. 5]. None of the other statements in Burdett's Amended Pre-Hearing Statement establish an element of retaliation.

Even if Burdett had established her retaliation claim, under the burden-shifting analysis of McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973), there was abundant evidence that the Agency had a legitimate basis to discipline Burdett for her misconduct, as established above.

At hearing, Burdett advanced no other credible basis for her retaliation claim. She claimed she was denied an impartial hearing officer at her pre-disciplinary meeting, but no hearing officer is required at that stage of the process. She disagreed with her prior work reviews and Performance Improvement Plans and completed one of them early, but neither statement alleges an element of a retaliation claim. She disagreed with a prior verbal reprimand, but her disagreement is not a protected activity. She claimed a prior supervisor retaliated against her, but acknowledged he was not involved in the current discipline [Burdett cross-exam]. Finally, Burdett disagreed with the Agency's prior assessments of her interactions with subordinates despite overwhelming evidence to the contrary. In short, Burdett failed to prove her demotion was retaliatory.

V. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-41 to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR 16-41. The measure of these considerations is whether the penalty assessed is within the range of penalties that could be imposed by a reasonable and prudent administrator, or is clearly excessive. In re Ford, 48-14A, 8 (CSB 9/17/15).

A. Seriousness of the proven offenses.

Burdett's attitude, actions, and lack of support for her staff, created a highly toxic work environment for many of her subordinates. Her purposefully demeaning words, actions and failure to support her staff were antithetical to her role as manager and supervisor. A suspension or single-level demotion would have left her in a position of authority over some subordinates after she repeatedly demonstrated an inability to maintain an attitude of support and encouragement of subordinates, and even continued to blame them for her own rule violations.

The Agency could have terminated Burdett's employment for her actions and hostility, but found her technical competence was solid. The Agency's determination to retain Burdett's employment so that it could continue to benefit from her technical competence, while revoking her supervisory duties, was within the range of alternatives available to a reasonable administrator. [In re Ford, CSB 48-14A, 8 (9/17/15)].

B. Prior Record.

Burdett's disciplinary history included a verbal reprimand on July 2, 2014 and a written reprimand on June 2, 2016. She had several prior coaching and counselling sessions concerning her behavior toward subordinates and customers, and a formal “Action Plan” established on August 31, 2016, which was intended to correct Appellant's behavior. [Exh. 25]. Each time, Burdett improved for a short time, then reverted to her hostile and unsupportive ways, and displaying evident favoritism.

C. Likelihood of Reform.

Burdett denied all wrongdoing [Exh. Z], and continued to blame subordinates for her own wrongdoing even during hearing. Patti Anderson provided extensive coaching, support, and feedback to Burdett. [Anderson testimony; Exh. 1-3, 1-4]. She found even after extensive coaching and self-awareness testing, Burdett remained, except briefly, disconnected from understanding how her actions affected her subordinates. [Exh. 23-3 through 23-8; Exh. 24; Exh. 23-4 & 23-5]. In conjunction with her prior discipline for similar conduct and her supervisor's extraordinary efforts to encourage reform [see, e.g. Anderson testimony; Exh. S; Exh. 32-1; 37-2; 27-3; 34; 36; 39; Scott testimony], it was reasonable for the Agency to conclude lasting reform would be unlikely. [See Anderson testimony; Salazar testimony].

VI. ORDER

The Agency's two-level demotion of Burdett from Branch Manager to Motor Vehicle Technician II, issued on May 4, 2017, and effective May 8, 2017, is AFFIRMED.

DONE February 13, 2018.



Bruce A. Plotkin
Career Service Board 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 of CSR § 21-20 et seq., within fourteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the decision's certificate of delivery. See Career Service Rules at www.denvergov.org/csa. **All petitions for review must be filed with the following:**

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

Career Service Hearing Office

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

AND opposing parties or their representatives, if any.