HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal Nos. A009-18 and A018-18

DECISION AND ORDER

DAVID COATES, Appellant,

v.

DENVER PARKS AND RECREATION,
and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

Appellant David Coates (Appellant) appeals the Denver Parks and Recreation's (Agency) and the City and County of Denver's (City) February 9, 2018 temporary reduction in pay (Case No. 09-18) and its March 7, 2018 dismissal of him (Case No. 18-18), for alleged violations of specified Career Service Rules (CSRs).[1] On December 13, 2018, Hearing Officer Federico C. Alvarez conducted a consolidated hearing to determine the propriety of the Agency's discipline of Appellant. Assistant City Attorney Ashley M. Kelliher represented the Agency; Cheryl Hutchinson represented Appellant on Case No. 09-18 and Christopher M.A. Lujan, Esq. represented him on Case No. 18-18. The Agency's exhibits 1 through 8, 10 through 17, 20 through 24 and 26, and Appellant's exhibits G, J, K, and L were admitted into evidence. Senior Recreation Supervisor Patrick Minner, Director of Recreation Thomas Herndon, and Executive Deputy Director John Martinez testified on behalf of the Agency. The Appellant and Senior Human Resources Partner Dimitri Clarke testified for Appellant.

II. ISSUES

The following issues were presented for appeal:

A. whether the Appellant violated (Case No. 09-18) CSRs 16-29[2] G, I, R, and T, and (Case No. 18-18) CSRs 16-29 B, G, H, I, R, and T;[3] and

B. if the Appellant violated any of the aforementioned CSRs, whether the Agency's discipline of him conformed to the purposes of discipline under CSR 16-41.

III. FINDINGS

On August 12, 2013, Appellant began to work for the City at the Agency, and it periodically promoted him, ultimately to Recreation Program Coordinator on March 1, 2016.

A. Case No. 09-18

On January 23, 2018, Mr. Minner, Appellant's supervisor since the spring of 2016, required Appellant to attend a disciplinary meeting, which Mr. Herndon also attended. At the meeting,

[1] On October 4, 2018, the Hearing Officer dismissed Appellant's Whistleblower claim.
[2] The Career Service Board renumbered CSR 16-29 but the relevant subsections remain identical.
[3] The Agency dismissed Appellant's alleged violation of CSR 16-29 R before hearing.

Mr. Minner read a January 22, 2018 Written Reprimand (Reprimand) (Ex. 14) to Appellant, who rejected its substance, responding, "My supervisor is terrible." Appellant next refused to accept the Reprimand or sign a receipt for it, and instead pushed it back across the table toward Mr. Minner while commenting, "This is your last chance to rescind this write up or things are going to get very ugly." Mr. Herndon advised Appellant that the Agency would not rescind the Reprimand. Appellant further commented, "This is how you (guys) want to play it? Okay, it's about to get really ugly, I have all kinds of documentation. It's going to be war."[4] Mr. Minner also testified that Appellant criticized him further, stating that he did not understand how Mr. Minner could even be a supervisor and that at times, it felt as if Patricia [Farrell] was the supervisor.

Mr. Minner testified that Appellant was angry, raised his voice, and was agitated. He testified that Appellant addressed the comments to him, and leaned forward as the meeting went on, with a focused look in his eyes. Mr. Herndon acted to preclude an escalation of the exchange into an incident. He stood up after Mr. Minner had concluded the necessary comments and Appellant had responded, but positioned himself between them. He then escorted Appellant to the Office of Human Resources (OHR) so Appellant could investigate how to file a grievance to address the issues which he had allegedly documented. Mr. Herndon then returned to the meeting room, where Mr. Minner now declared that he felt physically threatened by Appellant. On their way to leave the building, they saw Mr. Martinez and reported to him Mr. Minner's concerns about Appellant. Mr. Martinez decided to report Mr. Minner's concerns to OHR. So, the Agency started a new disciplinary process against Appellant for his January 23 reaction to the Reprimand and his comments at the meeting.

On February 5, 2018, Appellant and his representative Cheryl Hutchinson met with Mr. Herndon, Mr. Minner and Ms. Clarke for a contemplation of discipline meeting. Appellant did not dispute the comments of January 23 that the Agency attributed to him, but defended them by stating that he intended no ill will through them and, "I felt I was backed into a corner and had to stand up for myself." Appellant professed to not be a violent person and explained that he had been dealing with the workplace issues that he had raised with Mr. Herndon and OHR.

After considering the totality of the circumstances, on February 9, 2018, the Agency disciplined Appellant with a temporary reduction in pay of 6.67% for three pay periods, the equivalent of two days of pay. (Ex. 3). On February 25, 2018, Appellant filed this timely appeal.

B. Case No. 18-18

Mr. Minner and Appellant had driven their cars to the January 23 meeting, and both parked in the building's garage. Mr. Minner had arrived first and parked his black 2010 Cadillac sedan facing the wall. About 20 minutes later, Appellant then arrived and parked his white 2017 Honda sports utility vehicle (SUV) in the adjoining space to the left of Mr. Minner's car, also facing the wall. This area is monitored by video cameras, which recorded their actions. (Ex. 7). Appellant's higher and larger SUV was closer to the camera, perpendicular to it, such that it mostly blocked Mr. Minner's car from view. When parked, only portions of the cars are visible, only from the rear wheel to the rear of Appellant's car, and only the rear end of Mr. Minner's car. The other visible cars parked in this garage show that people park their cars facing the wall, too close to it for a person to walk between the front of the cars and the wall. The wall is along the left side of the camera view.

After the meeting, Appellant returned to his car first. He walked toward it carrying a bag, strapped over his shoulder, a water bottle in his left hand, and a key fob in his right hand. From a few feet away, Appellant unlocked his car, evidenced by its rear lights turning on briefly. (Ex. 7-1

[4] The Parties stipulated to these quoted comments by Appellant, also included in the record as Ex. 26.

at 1:42:33 p.m.) He then walked to the passenger side of his car, next to the driver's side of Mr. Minner's car, and unloaded his items into his car. The top of Appellant's head is briefly visible to the recording camera, but his higher SUV otherwise blocked him when he was between the cars. After about 40 seconds, Appellant emerged from between the cars, walked around the back of his car and toward its driver's side. He was putting his key fob into his right jacket pocket (Appellant testimony at 9:29:00 a.m.) but did not now have his bag or water bottle.

Appellant then entered his car and backed out to leave. As he did so, he exposed the full length of the driver's side of his car to the camera, and next its front as he drove toward the camera and the exit. He also exposed Mr. Minner's car, from most of the rear door to its rear, along the driver's side. Mr. Minner then arrived at his car, entered it, and backed it out to leave. As he did so, he exposed the full length of the driver's side of his car to the camera, now with a scratch along the driver's side door, consistent with an object being scraped along it. The video shows that Mr. Minner's car was not so damaged when he arrived and parked at this location. Mr. Minner did not realize that his car was damaged until he returned to his work site.

After trying unsuccessfully to report his car damage for three days, on January 26, Mr. Minner reported it to the Denver Police Department (DPD), which assigned Detective Sides to investigate it. Detective Sides reviewed the video record of the garage during the time when Appellant and Mr. Minner accessed it. It showed that: Mr. Minner's car was not damaged when he arrived at the garage, only Appellant accessed its driver's side while it was there and before Mr. Minner retrieved it, and it was damaged when Mr. Minner left the garage. Detective Sides concluded therefrom that Appellant damaged the driver's door of Mr. Minner's car and on February 21, he submitted an affidavit for and obtained an arrest warrant for Appellant. (Ex. K). On March 29, 2018, Appellant surrendered to the DPD, which arrested him on the warrant.

Based on Appellant's actions and the criminal investigation,[5] the Agency issued another contemplation of discipline letter to Appellant. On March 5, 2018, Appellant and Ms. Hutchinson met with Mr. Martinez, Mr. Herndon, Ms. Clarke, and Mr. Minner for a contemplation of discipline meeting. Appellant denied damaging Mr. Minner's car, and explained that he could not have done it since he used only a key fob for his car, although he admitted that he had, at times, used other keys for work.

After considering the totality of the circumstances, on March 7, 2018, the Agency dismissed Appellant, effective March 6, 2018. On March 16, the Agency amended the effective date of Appellant's dismissal to March 7, 2018. (Ex. 4). On March 20, 2018, Appellant filed this timely appeal. On April 3, 2018, Mr. Lujan entered his appearance for Appellant in Case No. 18-18.

IV. ANALYSIS

A. Jurisdiction and Review

CSRs 19-20 A.1.a. and b. vest the Career Service Hearing Office with jurisdiction over these consolidated appeals as they are direct appeals of a temporary reduction in pay and of a dismissal. The Hearing Officer is required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo.App. 1975); CSR 19-55

[5] On April 3, 2018, the Denver District Attorney (DA) charged Appellant with felony, criminal mischief. They agreed that Appellant would pay Mr. Minner $500 in restitution, his deductible expense for the repair of his car, in return for the dismissal of the case. They effectuated this agreement and, thus, Appellant remained innocent of the criminal charge and it is not available to be used against him in these proceedings.

B. Burden and Standard of Proof

The Agency retains the burden of proof throughout the case to prove, by a preponderance of the evidence, that Appellant violated the aforementioned sections of the CSRs, and that its discipline of him complied with CSR 16-41's purposes of discipline. CSR 19-55 A.

C. Career Service Rule Violations

1. CSA 09-18 - February 9, 2018, Temporary Reduction in Pay

a. Authority

The Agency imposed a temporary reduction in pay on Appellant based on alleged violations of CSR 16-29 G, I, R, and T. Appellant defends against the Agency's allegations on the grounds that they are not based in fact. CSR 16-29 states in relevant part:

> G. 1. Failing to meet established standards of performance including either qualitative or quantitative standards.

In citing CSR 16-29 G.1., the Agency described the specific applicable standard as:

> City STARS Values
> Respect for Self & Others - Treats others with consideration and high regard. Demonstrates respect for the differences that exist among fellow employees and recognizes that those differences are an important source of innovation, progress and interpersonal awareness.

> I. Failure to maintain satisfactory working relationships with co-workers and other individuals the employee interacts with as part of his or her job.

> 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.

In citing CSR 16-29 R., the Agency described the specific applicable policy as:

> Executive Order 112 – Violence in the City Workplace:[6]
> 2.0 Policy: Violence has no place in any of the City and County of Denver's work locations or at any City-sponsored event, and is strictly prohibited. Moreover, violence committed by employees of the City and County of Denver, whether on-duty or off-duty, reflects poorly on the City and County of Denver and is strictly prohibited. A common form of violence is domestic or family violence, which also is strictly prohibited when the City's employees are the perpetrators of such violence.
>
> 3.0 **Definitions**:
>
> **Violence** is defined, but not limited to: …
>
> (b) the actual or attempted: threatening behavior, verbal abuse, intimidation, harassment, obscene telephone calls or communications through a computer

[6] Executive Order (EO) 112 was modified in July 2018 but this version was in effect on January 23, 2018.

system, swearing at or shouting at, stalking.

T. Conduct which is or could foreseeably: …

3. Be unbecoming of a City employee.

b. Failure to Meet Standards – Respect for Self & Others

STARS values of teamwork and respect for self and others are not enforceable as specific performance standards under this rule. In re Oyama, CSA 07-13, 4 (6/4/13). Aspirational goals do not constitute enforceable standards, as they provide insufficient notice of what conduct is prohibited. In re Espinoza, CSA 73-16, 7 (4/14/17); In re Rodriguez, CSA 12-10, 11 (10/22/10). The Agency claims that Appellant violated STARS values of Respect for Self and Others and not any specific performance standard implementing it. Thus, the Agency cannot prove this allegation.

c. Failure to Maintain Satisfactory Relationships

The rule is violated by "conduct that an employee knows, or reasonably should know, will be harmful to co-workers, other City employees, or the public, or will have a significant impact on the employee's working relationship with them." In re Black, CSA 03-14, 5 (6/9/14), *citing* In re Burghardt, CSB 81-07, 2 (8/28/08).

On January 22, Mr. Minner issued to Appellant a Reprimand for neglect of duty, and for failure to comply with a supervisor's orders, meet established standards, and maintain satisfactory relationships with others. At the January 23 meeting, Appellant did not accept responsibility for his reprimanded actions and did not address how to eliminate them or improve his performance. He stated no intent to become cooperative with the Agency managers or his co-workers. Instead, Appellant criticized Mr. Minner as "terrible" and threatened criticism of the Agency because it would not withdraw the Reprimand. He thereby implied an improper proposition, that the Agency must ignore his shortcomings or he will criticize it. Certainly, Appellant's reaction and negative attitude were at least unproductive.

In addition, the evidence showed that Appellant's refusal to acknowledge, much less agree to correct, his misconduct impaired the operations of the team. Mr. Minner would thereafter not be alone with Appellant. He sought to avoid Appellant's reaction to future criticisms or orders. Mr. Herndon advised the team members, consisting of Mr. Minner and the three physical fitness instructors, that Mr. Minner and Appellant would thereafter communicate only by email, with a copy to Mr. Herndon. These reactions clearly disrupted the operation of such a small team. A reasonable person analyzing these facts objectively would conclude that Appellant's January 23 actions caused a significant, negative impact on his working relationship with the team. Therefore, the Agency proved this allegation by a preponderance of the evidence.

d. Conduct Which Violates EO 112 – Violence

Evidence which proves only that the actor was loud, frustrated, and upset, without more, is insufficiently egregious to violate EO 112. In re Owens, CSA 69-08, 6 (2/6/09). A merely angry interaction does not constitute abuse of an employee. In re Harrison, CSA 55-07, 89-07 & 90-07, 53 (6/17/10), *citing* In re Owens, CSA 69-08, 7 (2/6/09). A statement is a threat if a reasonable person would interpret it as such. In re Harrison, CSA 55-07, 89-07 & 90-07, 50 (6/17/10), *citing* In re Katros, CSA 129-04, 8 (3/16/05).

At the January 23 meeting, Appellant described his supervisor as "terrible" and threatened an upcoming "war" involving documentation, which he implied would show Agency

malfeasance. In and of itself, his language was not foul or insulting. The evidence does not show that he tried to become physically violent or threatened future violence. Of the three individuals present, only Mr. Minner considered Appellant's behavior threatening, although Appellant addressed his comments to "you guys." The recording of the meeting documents that, although Appellant disagreed with all the Agency's allegations, his voice was only slightly louder than conversational. Thus, without proof of physical or verbal violence, or the threat of it, Appellant's statements did not reasonably constitute a threat. Therefore, the Agency failed to prove this allegation by a preponderance of the evidence.

e. Conduct Unbecoming a City Employee

At the January 23 meeting, Appellant's rejection of the Agency's Reprimand of him and his threats to produce documentation of its issues do not constitute unbecoming conduct. First, Appellant's rejection of the Reprimand has no legal value. Such action is sufficiently regular, while perhaps not frequent, that Colorado's court system allows service of process of legal papers despite such rejection. *See* C.R.C.P. 4(k). Next, the Agency properly described to Appellant that the CSR 16-46 generally provides an employee the right to provide rebuttal evidence to its allegations at this meeting. (Ex. 5). Appellant exercised his right quite inartfully, threatening criticism of the Agency but not threatening harm to person or property or using foul language. This forum could have been appropriate for relevant criticisms of the Agency procedure as its representatives then present could address any actual issues raised. As such, CSR 16-46 sufficiently allowed Appellant's actions. Therefore, the Agency failed to prove this allegation by a preponderance of the evidence.

2. <u>CSA 18-18 - March 7, 2018 Dismissal</u>

a. Authority

The Agency dismissed Appellant based on alleged violations of CSR 16-29 B, G, H, I, R, and T. Appellant defends against the Agency's allegations on the grounds that they are not based in fact. CSR 16-29 states in relevant part:

B. Theft, destruction, or neglect in the use of City property; or property or materials of any other person or entity.

G. 1., included above. In citing this CSR subsection, the Agency described the specific applicable standard as Appellant's 2017 Performance Goals:

<u>City STARS Values</u>

Accountability & Ethics - Contributes to maintaining the integrity of the organization and displays high standards of ethical conduct.

Respect for Self & Others, included above.

Safety - Creates and maintains a safe work environment by taking action which prevents injury or harm to self, others, equipment and/or property to protect our residents and employees.

H. Intimidation or retaliation against an individual who has been identified as a witness, party, or representative of any party to any hearing or investigation relating to any disciplinary procedure, or any violation of a city, state, or federal rule, regulation or law, or against an employee who has used the dispute resolution process in good faith.

I. included above.

R., included above. In citing CSR 16-29 R., the Agency again described the specific applicable policy as EO 112, also included above.

T. 3., included above.

b. Destruction of Property of Another Person

The Hearing Officer concludes that Appellant damaged Mr. Minner's car in the garage on January 23, 2018, violating the prohibition against destruction of property of another person. Appellant knew that Mr. Minner had arrived earlier and would leave later than Appellant. Thus, Appellant realized that Mr. Minner would not have known that he had parked in the adjacent space, and might not suspect him of damaging Mr. Minner's car. A review of the surveillance video, including the person who previously occupied the spot next to Minner before Appellant arrived (Ex. 7-1 at 12:36:17), shows that, other than Mr. Minner, only Appellant accessed the driver's side of Mr. Minner's car during the time when it must have been damaged. Appellant spent about 40 seconds in this area, more than he needed to place his personal items in his car and pick up whatever items he had dropped in the process.

At the March 5, 2018 contemplation of discipline meeting, Appellant defended against this allegation by arguing that, since he only used a key fob, he did not have a key with which to damage Mr. Minner's car. (Ex. 6). However, the video record[7] shows what almost certainly is a key hanging from Appellant's fob as he walked toward and unlocked his car. (Ex. 7-1 at 1:42:29-30). Appellant ignored this evidence, which rendered incredible his denial of possessing any key. And as Appellant walked toward the driver's side of his car, he was putting his fob into his pocket, which he had no longer needed to unlock or start it. This calls into question why he still was handling his fob. Appellant also handled a snow brush which had fallen out of his car and with which he could have inflicted the damage. Regardless, the Hearing Officer only needs to determine whether Appellant damaged Mr. Minner's car, not the object with which he did so.

Appellant also testified incredibly that he did not recognize Mr. Minner's car in the garage. However, as a Cadillac make, Mr. Minner's car was uncommon. The video of the garage shows it could be the only Cadillac car there. Appellant testified that he had discussed Mr. Minner's Cadillac with him. Mr. Minner testified that they attended weekly or biweekly meetings to which they drove in their personal cars. He also testified that Appellant would, in jest, say things such as "Patty and the Caddy." Since Appellant knew that he and Mr. Minner would be at the same meeting, and access the same City garage, he knew that he had parked next to Mr. Minner's car. Appellant also testified that he was disappointed because OHR had deemed his past allegations against the Agency unfounded, yet it now issued him an unwarranted Reprimand. These experiences obviously frustrated Appellant, and he mostly blamed Mr. Minner for them. Thus, the evidence shows that Appellant damaged Mr. Minner's car in the garage although he denied it. Therefore, the Agency proved this allegation by a preponderance of the evidence.

c. Failure to Meet Standards – STARS Values

To prove a violation of this rule, the agency must prove (1) it established a performance standard; (2) it clearly communicated that standard to the employee; and (3), the employee failed to meet that standard. In re Rock, CSA 09-10, 5 (10/5/10), *citing* In re Mounjim, CSA 87-07, 8 (7/10/08). As described above, STARS values of Teamwork and Respect for Self & Others are not enforceable as specific performance standards under this rule. In re Oyama, *supra*. Aspirational goals do not constitute enforceable standards, as they provide insufficient notice of what conduct is prohibited. In re Espinoza, *supra*; In re Rodriguez, *supra*. The Agency claims only

[7] Use of the video software function, which allows enlargement of the video, facilitated this view.

that Appellant violated the STARS value regarding Respect and not any specific performance standard. Thus, the Agency cannot prove that Appellant committed such violation. Based on the same analysis, the Hearing Officer concludes the Agency cannot prove that Appellant violated this Rule on an alleged violation of the STARS values of Accountability & Ethics.

However, the Hearing Officer does not include in the above analysis the STARS value of: "Safety - … maintains a safe work environment by taking action which prevents … harm to … property to protect our … employees." Through this value, the Agency established a sufficiently specific standard, which it clearly communicated to Appellant. The Safety value's requirement that an employee take action to prevent harm to property to protect the Agency's employees obviously includes the sufficiently specific and enforceable prohibition against an employee harming the property of other employees. The Agency need not craft any other performance standard to explain this prohibition. Despite it, Appellant intentionally damaged Mr. Minner's car and thereby inflicted significant mental stress on him. Therefore, the Agency proved this allegation by a preponderance of the evidence.

d. Intimidation of or Retaliation Against a Witness

This rule contemplates that the retaliation must take place during the course of an investigation. In re Carter, CSA 87-09, 8 (2/17/10). As described above in Destruction of Property of Another Person, Appellant damaged Mr. Minner's car after the January 23 meeting at which the Agency issued the Reprimand to him, for which it had already concluded its investigation. While it then disciplined him for his comments at the meeting, the evidence shows that Mr. Martinez most likely started the investigation of Appellant's actions at the January 23 meeting after he damaged Mr. Minner's car. The evidence showed that Mr. Minner had delayed leaving the meeting room to avoid contact with Appellant so the conversation among Messrs. Herndon, Martinez and Minner most likely succeeded Appellant's damage to the car. Next, Mr. Minner did not know that Appellant damaged his car until February 12, 2018, when Detective Sides sent him the email with a photo of Appellant approaching his car in the garage (Ex. 16), after the Agency's February 9 discipline of Appellant. So, Appellant could not have retaliated against Mr. Minner during the course of any investigation through this damage. Therefore, the Agency did not prove this allegation by a preponderance of the evidence.

This rule also contemplates that the intimidation must take place during the course of an investigation. In re Carter, *Id*. Again, Appellant committed this misconduct after the Agency concluded one investigation but before it started a new one. Appellant could not have intimidated Mr. Minner during the course of any investigation through this damage. Therefore, the Agency did not prove this allegation by a preponderance of the evidence.

e. Failure to Maintain Relationships

Herein, Appellant damaged Mr. Minner's car on January 23. On February 12, Mr. Minner, personally and on behalf of the Agency, learned that Appellant was the perpetrator when Detective Sides provided him a photo of Appellant approaching his car. On February 13, the Agency placed Appellant on Investigatory Leave. Thereafter, Appellant did not return to work at the Agency since it dismissed him upon concluding its investigation and disciplinary process. Thus, there was no further relationship at the worksite between Appellant and his former co-workers that could be affected by his damage to Mr. Minner's car. Therefore, the Agency did not prove this allegation by a preponderance of the evidence.

f. Conduct Which Violates EO 112 – Violence

EO 112, subsection 3.0(b)'s definition of violence, "the actual or attempted: threatening behavior, verbal abuse, intimidation, harassment, obscene telephone calls or communications through a computer system, swearing at or shouting at, stalking," requires knowledge by the victim of the perpetrator's action, whether or not such action occurred in the victim's presence. Some subparts of this definition appear to require that the victim realize the perpetrator's action and identity promptly for it to constitute a violation. "[V]erbal abuse… swearing at or shouting at" almost require a personal infliction of the violative action upon the victim. A victim of intimidation, harassment or stalking would be concerned for her/his safety or be distressed by it only if s/he knew of it, and the identity of the perpetrator from which to infer such intent. The use of a telephonic recording or an electronic mail to convey a threat could be accomplished on a delayed basis, but that did not occur here. Herein, Mr. Minner learned of his car damage 30 days after the fact, which does not constitute violence on January 23, 2018, as defined in whole or in part by EO 112. Therefore, the Agency did not prove this allegation by a preponderance of the evidence.

g. Conduct Unbecoming a City Employee

As described above in Destruction of Property of Another Person, Appellant's damage to Mr. Minner's car constitutes conduct unbecoming a City employee. Therefore, the Agency proved this violation by a preponderance of the evidence.

V. DEGREE OF DISCIPLINE

A. 16-41 Purpose of Discipline:

> The purpose of discipline is to correct inappropriate behavior or performance, if possible. The type and severity of discipline depends on the gravity of the offense. The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record. The appointing authority shall impose the type and amount of discipline he or she believes is needed to correct the situation and achieve the desired behavior or performance.

B. Case No. 09-18

1. Seriousness of the proven offense

The proven violation of Appellant's Failure to Maintain Satisfactory Relationships is serious since it warranted the Agency's attention and intervention. This offense impeded the Agency's productivity and created a distraction that it had to address. If ignored, it would only fester and further impair the Agency's productivity. Appellant needed to react cooperatively to end his misconduct and improve his performance, but he instead reacted negatively. Appellant thereby continued his pattern of insubordination, documented in his January 5, 2017 and January 22, 2018 Written Reprimands. (Ex. 13, pp. 52-4, 62-5). Rather than take responsibility for his misconduct, Appellant justified it as his implementation of his personal higher moral code, which he would not compromise for the Agency. (Ex. 5).

2. Prior Record

In January 2017, the Agency issued Appellant a Written Reprimand for neglect of duty, failing to comply with orders of supervisor, dishonesty, poor job performance, and for conduct

that is prejudicial to good order and brings disrepute to the City. In January 2018, the Agency issued Appellant the Reprimand for neglect of duty, failing to comply with orders of a supervisor, failing to meet established standards of performance, and failing to maintain satisfactory relationships with others.

3. Likelihood of Reform

Appellant's evidence regarding reform was mixed. First, Appellant professed to enjoy his work and be committed to it. However, he rejected the Agency's criticisms of him out of hand and instead threatened it with criticism. Had Appellant accepted the Reprimand and endeavored to eliminate his misconduct as described in it, he could have contained his discipline at that point. At this juncture, the prospect for Appellant's reform is questionable.

Therefore, a temporary reduction in pay, the equivalent of two days of pay, was reasonable since it was Appellant's third discipline, with recurring issues, in a little over one year.

C. Case No. 18-18

1. Seriousness of the proven offense

The proven violation of Appellant's Destruction of Property of Another Person is of the utmost seriousness. City employees must be free from fear of reprisals to their property for doing their jobs. An Agency cannot allow a disgruntled employee to intentionally damage the property of another employee over a work disagreement. While in the criminal justice system, Appellant's case was a lower priority for the DA, the allegations sustained probable cause for a felony charge. So, while the Agency cannot discipline Appellant for his criminal case, it established a potential point of reference for the seriousness of his misconduct. To his credit, Appellant paid restitution to Mr. Minner. Nonetheless, Appellant had now exceeded his pattern of insubordination. And despite evidence of no other potential perpetrator, Appellant damaged Mr. Minner's car but denied it throughout the disciplinary process.

2. Prior Record

As described above, the Agency issued Appellant two Written Reprimands generally for failing to perform his duty well, follow instructions, and contribute properly to his team. The Hearing Officer also considers the Agency's February 9, 2018 discipline of Appellant for Failure to Maintain Satisfactory Relationships, the only proven violation from that disciplinary action.

3. Likelihood of Reform

Appellant did not provide any evidence that he will reform, and he refused to accept responsibility for his misconduct. *See* In re Carter, CSA 87-09, 9 (2/17/10) (Discipline less than dismissal would have been unlikely to correct the misconduct where appellant persistently lied about it, then attempted to subvert the investigation into it.)

Therefore, the Agency could no longer trust Appellant due to his dishonesty and vindictiveness, rendering his continued employment untenable. It had no option but to dismiss Appellant to protect its other employees and property from any relapse by him.

VI. CONCLUSION

Considering the evidence, the Hearing Officer concludes that the Agency's Temporary Reduction in Pay and that its Dismissal of Appellant were both appropriate. Both disciplinary

actions (1) comport with CSR 16-41 as they are properly fashioned to address inappropriate behavior, and are reasonably related to the seriousness of Appellant's conduct; and (2) the record reflected a sufficient, reasonable, and articulated justification for them, they are within the range of alternatives available to a reasonable and prudent administrator, and are not clearly excessive. *See* In re Romero, CSB 28-16A, 2 (6/15/17); In re Redacted, CSB 31-13A, 1-2 (8/8/14).

VII. ORDER

Accordingly, the Hearing Officer AFFIRMS the Agency's temporary reduction in pay of Appellant and AFFIRMS its dismissal of Appellant.

DONE December 19, 2018.

Federico C. Alvarez
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 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 certificate of delivery, below. *See* Career Service Rules 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

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.