HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO

Appeal Nos. 40-04, 75-04

DECISION

IN THE MATTER OF THE APPEAL OF:

BONNIE FREEMAN, Appellant,

vs.

DEPARTMENT OF HUMAN SERVICES, Agency,
and the City and County of Denver, a municipal corporation.

I. INTRODUCTION

In both these consolidated cases, Ms. Bonnie Freeman (the Appellant), appeals her termination, imposed first on March 15, 2004, then again on May 21, 2004, by the Denver Department of Human Services (Agency). The Appellant filed timely appeals on March 18, 2004 and on June 1, 2004, respectively. A hearing concerning these appeals was held on February 8-9, 2005, before Hearings Officer Bruce A. Plotkin. Jurisdiction was not contested. The Appellant was present and was represented by Dolores Atencio, Esq. The Agency was represented by Niels Loechell, Esq., with Ms. June Allen serving as advisory witness for the Agency.

The Agency presented Ms. Verlinda Quinones, Ms. Gail Ries-Winger, Ms. Tamara Tyler, Ms. Sheila Jennings, Ms. Helen Haines and Ms. June Allen as its witnesses. The Appellant testified on her own behalf and also presented witness Charles Liken, Esq.

Agency exhibits 1-9 were admitted by stipulation. Appellant's exhibits, A-Q, S, U, V, and Z were also admitted by stipulation; R was admitted over objection; T was not offered; W and X were withdrawn by the Appellant; and Y-1 was admitted without objection.

II. ISSUES

A. Whether the Appellant violated Executive Order #112, Career Service Rule (CSR) 16-50 A. 8), 20), 16-51 A. 4), or 11).

B. Whether the Agency engaged in unlawful retaliation against the Appellant.

C. If the Appellant violated any of the above-referenced provisions, whether the Agency's termination of the Appellant was reasonably related to the seriousness of the offense and took into consideration the employee's past record.

III. FINDINGS OF FACT

The Appellant began working for the Agency in April 1999 as a collection agent. In the fall of 2000 she was promoted to Administrative Support Assistant IV in the Financial Services, Revenue-Generating Unit of the Agency (Agency). She remained in that position until her termination.

The Appellant and Ms. Verlinda Quinones (Quinones) were co-workers in adjoining work cubicles at the Agency. Until January 30, 2004, they shared a friendly relationship and never had a quarrel or disagreement. On Friday, January 30, 2004, near the end of their work day, the Appellant and Quinones had been talking amicably. Quinones was about to leave for the weekend and drive to Canyon City to inquire about some family property involved in an estate action. Quinones told the Appellant she tried to obtain information about the property via the internet, and found there was a fee for the information. The Appellant offered her credit card to Quinones to purchase the on-line information, but Quinones declined, deciding she would rather seek the information in person. The Appellant then checked the weather forecast in the DENVER POST newspaper, as she was concerned there might be bad weather for Quinones' drive to Canyon City.

Quinones then became interested in a small, pebble-fountain on the Appellant's desk. Quinones asked "do you have to go out and find your own rocks?" which made the Appellant laugh. The Appellant reached over with her open hand to Quinones' face, saying "you silly goose," or "silly willy" and either tapped or slapped Quinones' right cheek. Quinones said "Oh, that hurt!" The Appellant apologized. Some conversation continued about other things, then both clocked out and left without another word about the incident. There were no other witnesses.

When Quinones returned to work, the following Tuesday, February 3, she told her immediate supervisor, Gail Ries-Winger, about the incident with the Appellant, but did not want the Appellant to be disciplined. [Exhibit P, p.101, 102]. When asked why

she didn't report the incident before leaving on Friday, Quinones replied "I needed to get out of there [to go to Canyon City]."

The Agency Deputy Manager, Valerie Brooks, placed the Appellant on immediate investigatory leave. [Exhibit 4] and asked Charles Liken, Esq., a Senior Agency Personnel Analyst for the Agency, to investigate the January 30 incident. Liken concluded "Bonnie Freeman intentionally made contact with the inside palm of her open hand to the face of Verlinda Quinones on January 30, 2004." [Exhibit 9, p.3]. Liken made no conclusion as to whether the contact was a pat or a slap, and made no recommendation as to whether discipline would be appropriate.

Ms. June Allen (Allen), the Appellant's second-level supervisor, convened a pre-disciplinary meeting on Friday, March 5, 2004. The meeting was attended by the Appellant and her union attorney, Mark Schwane, Esq., Allen, Neils Loechell, Esq. from the City Attorney's Office, Tamara Tyler and Liken, both from the Agency Human Resources Department. [Exhibit J]. On March 15, 2004, Allen terminated the Appellant's employment. The Appellant filed her appeal of that termination on March 18, 2004, CSA appeal #40-04. .

The Agency failed to complete the above-referenced investigation within the time allowed by CSA rule, and failed to obtain an extension of time to conduct its investigation pursuant to CSR 16-55, so the Agency withdrew its termination of the Appellant on April 27, 2004, and the entire disciplinary process was repeated. The second termination became effective May 21, 2004. [Exhibit 2]. The Appellant filed her second appeal, CSA appeal #75-04, on June 1, 2004. During the entire process for the second termination the Appellant remained on investigatory leave. The alleged facts, violations upon which the Agency terminated the Appellant's employment, and the Appellant's claims are the same in both appeals.

IV. ANALYSIS

A. Executive Order 112 Violence in the Workplace (2/7/95).

In pertinent part, Executive Order #112 (#112) reads as follows.

II. General Policy

It is the goal of the City and County of Denver to rid work sites of violent behavior or the threat of such behavior.

To ensure and affirm a safe, violence-free workplace, the following will not be tolerated.

A. Intimidating, threatening or hostile behaviors, physical assault....

The Agency relied principally upon Executive Order 112 (#112) in terminating the Appellant's employment. There are two issues to resolve here: 1. whether the Appellant struck Quinones; and 2. if the Appellant struck Quinones, was that contact an act of violence as proscribed by #112.

The first issue is quickly resolved. The Appellant admitted her hand contacted Quinones' right cheek. [Appellant testimony, Exhibit I].

As to the second issue, the Agency concluded the Appellant violated #112 by slapping Quinones on January 30, 2004. [Allen testimony]. Allen testified the Appellant's slap was an assault, and was also intimidating and abusive toward Quinones. Quinones testified she would not have reported the incident except the Appellant never apologized or explained the unwelcome contact, leading Quinones to question whether it might happen again. She stated the slap to her cheek was hard enough to leave a red mark noticed by her husband who picked her up from work. [Quinones testimony]. Quinones' husband did not testify at hearing, so that hearsay evidence is given nominal weight.

The Appellant responded she intended no harm, only a friendly gesture. She testified she is very physical in her interactions with people. [Appellant testimony, Exhibit I]. Ms. Helen Haines (Haines), a co-worker of both Quinones and the Appellant, affirmed the Appellant uses her hands "a lot" in communicating with others and uses physical contact in her normal interactions with others. [Haines testimony]. In addition, the Appellant stated as soon as Quinones said "oh, that hurt," she apologized immediately, by saying "I'm sorry, Verlinda. I was just kidding around," and they continued their conversation about Quinones' upcoming trip to Canyon City. The Appellant denied there was a red mark to Quinones' face after the contact. [Appellant testimony, Exhibit 2].

The Hearings Officer concludes the Appellant slapped, not tapped Quinones' right cheek on January 30, 2004, and that slap caused Quinones to feel pain. First, the Appellant admitted her hand contacted Quinones' right cheek. Next, she admitted Quinones immediately held her cheek and said "oh, that hurt," indicating her surprise and pain from a substantial slap. Third, since both women acknowledged they had a friendly discussion just prior to the incident, and were congenial colleagues, it is unlikely Quinones had any reason to invent the surprise and pain she felt by the Appellant's gesture. Striking another so as to cause pain is an assault. Colorado Revised Statutes 18-1-901 (1) (c) (2003), 18-3-204 (1977).

The Appellant also argues Quinones' delay in reporting the incident belies its severity. The Hearings Officer concludes that Quinones reporting the incident at all, despite her friendship with the Appellant, confirms how firmly the Appellant struck her,

whether or not a red mark remained. The fact that Quinones waited four days to report the incident merely affirms her mixed feelings about whether to report the incident.

The Appellant also claimed bad intent is required to find the Appellant in violation of #112. The Hearings Officer disagrees. #112 neither states nor infers bad intent is required as a prerequisite to finding a violation under its terms.

The Appellant also argued at length about her credibility compared with Quinones. The Hearings Officer finds both witnesses were equally credible. The small differences in the testimony of Quinones and the Appellant which were cited by the Appellant[1] are readily attributable to normal differences in memory or perception, and not to any substantial difference in credibility. Besides, both witnesses' statements could be true perceptions. The Appellant felt she touched Quinones' cheek softly. Quinones felt it was too hard.

In summary, the Hearings Officer finds the Appellant slapped Quinones, and the slap caused Quinones to feel pain on her cheek, an assault. Quinones had no reason to invent or exaggerate her pain. The assault, albeit minor, falls within the proscription of #112. For these reasons, the Hearings Officer finds the Agency proved the Appellant violated #112 by a preponderance of the evidence.

B. CSA 16-50 A. 8) Threatening, fighting with, intimidating, or abusing employees or officers of the City and County of Denver for any reason....

As the Appellant's appointing authority, Allen concluded the Appellant violated this rule because "a slap to the face is a physical threat and would include abusing employees and intimidating." [Allen testimony]. The Appellant's response was the same as to the allegations, above, concerning #112. The Hearings Officer concludes the Appellant's slap to Quinones constitutes an abuse of that employee. Abuse is defined as physical maltreatment (Black's Law Dictionary, Abridged 6th Ed. 1991), a considerably low burden. The Hearing Officer finds the Appellant's slap of Quinones meets the maltreatment threshold required to find the Appellant in violation of this rule.

[1] The Appellant cited the following list of inconsistencies in Quinones' testimony as proof of her lack of credibility: that she didn't remember sending an email to her supervisor after the incident; that she denied she and the Appellant were friends while admitting many indicia of friendship; that she remembered only one loan from the Appellant instead of two; that she testified the Appellant's slap was hard enough to leave a red mark on her cheek versus an in-hearing demonstration where Quinones slapped the back of her own hand, leaving no mark minutes later; that she didn't remember the Appellant apologizing immediately after the incident. [Appellant closing argument]. None of these inconsistencies is convincing evidence of Quinones' lack of credibility.

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

The Agency established conduct upon which the Hearings Officer found the Appellant in violation of CSA 16-50 A. 8), above. Therefore, this allegation is dismissed.

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

The Agency's evidence that the Appellant violated this rule was Quinones' testimony that she no longer wishes to work with the Appellant because she did not know what brought about the slap and therefore is concerned the Appellant could repeat the aggression. [Quinones testimony]. The Appellant responded she and Quinones continued a friendly conversation well after the incident, so any claim of concern or fear now by Quinones is disingenuous. [Appellant testimony].

This Hearings Office has found that a violation of CSR 16-50 A. 8) does not necessitate finding a violation of CSR 16-51 A. 4). In the case In Re Day, CSA #12-03 (10/9/03), the Appellant's outburst "I wish they'd let me do my f...ing job," accompanied by a period of rage violated 16-50 A. 8) when some employees were afraid one month later. Despite that conclusion, the Hearings Officer found the Appellant was not in violation of 16-51 A. 4), since there was no evidence she was unable to work with her co-workers. Similarly, the evidence does not prove by a preponderance of the evidence that the Appellant would be unable to work with Quinones or any other employee. Specifically, Quinones' concern that she was concerned the Appellant might react similarly again, is no more convincing than the Appellant's testimony that they continued to have a pleasant conversation after the incident. The Hearings Officer, as stated above, finds both witnesses equally credible. There is no objective evidence that the incident, even if as stated by Quinones, would prevent the Appellant from working satisfactorily with other employees. For these reasons, the Agency has not proven the Appellant violated CSR 16-51 A. 4) by a preponderance of the evidence.

E. CSA 16-51 A. 11) Conduct not specifically indentified herein may also be cause for progressive discipline.

Since the Agency presented evidence specific to CSA 16-51 A. 4), and none as to this violation, it is dismissed.

F. Appellant's claim of Retaliation.

A prima facie case of retaliation is made by showing (1) a protected employee action, (2) adverse action by an employer either after or contemporaneous with the employee's protected action, and (3) a causal connection between the employee's action and the employer's adverse action. Poe v. Shari's Mgmt. Corp., 1999 U.S. App.

LEXIS 17905, 188 F. 3d 519 (10th cir.1999)(unpublished), Morgan v. Hilti, Inc., 108 F. 3d 1319 (10th cir. 1997).

It was uncontroverted that the Appellant complained to both her supervisors, between 2000 and 2004, about a co-worker, Oyler, who she believed was not fulfilling his work requirements, and who, she believed, was engaging in wrongful activities. Her complaints included that Oyler was allowed to make up tardy start times when others were not, that he slept at his desk during work with full knowledge of his supervisors, that he sold fish and fish tanks to other employees during work hours, and that he threatened her in front of Ries-Winger, none of which resulted in discipline. [Exhibit G, V, Appellant testimony]. The Appellant stated her supervisors tolerated Oyler's behavior even after her complaints to both supervisors. [Appellant testimony].

Allen replied she investigated the Appellant's complaints and found Oyler was not treated differently than anyone else. She found Oyler slept at his desk only during his lunch hour; nonetheless, she issued an all-employee directive against the practice, in order to avoid any unfavorable perception. She also ordered Oyler not to sell items for profit during work hours.

The Appellant also claimed Ries-Winger engaged in the unlawful practice of back-dating without consequence, even after the Appellant complained to Allen about the practice between 2000 and 2004. According to Allen, back-dating means recording an action as if it happened on a different date. She believes the Appellant's complaints may have applied to the permissible practice of recording the actual date of an event later than the occurrence. For example, if a client interview took place at the end of day on January 18, and the next day the employee recorded "on January 18, I interviewed the client. Signed Employee, January 19," then there was no wrong doing. The Appellant presented no specific proof of the wrongful practice, and the Hearings Officer cannot find, by a preponderance of the evidence, that her supervisors knowingly allowed the practice. Nonetheless, the Appellant's good-faith reporting of these problems was not disputed, and the Hearings Officer finds the Appellant's good-faith whistle-blowing, concerning Oyler and concerning back-dating, are protected actions under the first test in Poe, above. *See also* CSR 16-106, 130.

The Agency terminated the Appellant after her complaints about Oyler and about back-dating. The Appellant has therefore met the second Poe test, citing an adverse Agency action following her protected action.

As to the third Poe test, a causal connection between the Appellant's complaint and the Agency adverse action, the Appellant has failed to meet her burden of production. The Appellant stated she complained to her supervisors about Oyler between 2000 and 2004, including a memorandum to Allen in August 2003. [Appellant testimony, and Exhibit V]. These dates are too far removed from the January 30, 2004 incident to link the Appellant's complaints with the Agency adverse action against the

Appellant. The third prong of the Poe test requires contemporaneous or very close temporal proximity of the adverse agency action and the protected employee action. *Id.* So too, regarding the Appellant's complaints concerning the practice of back-dating. The only evidence concerning back-dating is a memorandum forbidding the practice, issued by the Agency Manager, Roxanne White. The date of the memorandum is October 2003, more than five months before the Agency first attempted to terminate the Appellant's employment, and there is no evidence the memorandum was issued because of the Appellant's complaint.

The Appellant agreed her supervisors consistently awarded her "exceeds expectations" or "meets expectations" reviews during the same 2000 to 2004 period she complained to them about malfeasance. [Exhibits B-E]. Also, during the same period, Allen issued several commendations for the Appellant's work. [Exhibit F]. The Agency concluded, and the Hearings Officer agrees, that issuing positive reviews and commendations is a curious way to retaliate against someone. [Agency closing argument]. The Appellant has failed to meet the third Poe test, thus she has failed to establish a *prima facie* case for retaliation.

The Appellant violated Executive Order #112, and Career Service Rule 16-50 A. 8). Therefore, the Agency was justified in assessing discipline. The remaining issue is whether the Agency's termination of the Appellant was reasonably related to the seriousness of the offense and took into consideration the employee's past record.

V. DEGREE OF DISCIPLINE IMPOSED

Section 16-10 Purpose

> The purpose of discipline is to correct inappropriate behavior or performance. The type and severity of discipline depends on the gravity of the infraction. 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 or designee will impose the type and amount of discipline she/he believes is needed to correct the situation and achieve the desired behavior or performance.
>
> The disciplinary action taken must be consistent with this rule. Disciplinary action may be taken for other inappropriate conduct not specifically identified in this rule.

CSR 16-10.

Allen explained her decision to terminate the Appellant's employment was based, in part, upon the Appellant's violation of #112, in conjunction with the Agency's zero-tolerance policy for violence in the workplace. She stated any violation under #112 must be dealt with by serious discipline, meaning whatever it takes to stop the behavior. Allen rejected a lesser discipline because the Appellant provided no explanation for the slap, therefore Allen had no way of knowing whether the behavior would be repeated. She also stated she has an obligation to provide a safe working environment for her employees. Allen also explained the Appellant's violation of CSR 16-50 A. 8) was a factor in the decision to terminate the Appellant's employment for the same reasons as stated above for #112. [Allen testimony].

The Agency is justifiably concerned about violence in the workplace. Radio, T.V., film and the print media fill us with reports and images of it.[2] Because supervisors are charged with the safety of their subordinates, it is understandable that a supervisor would prefer to err on the side of too much, rather than not enough, discipline. Supervisors also understand they too face discipline for failing to enforce #112.[3] All these concerns have combined to create a work place environment of zero-tolerance under #112.

Despite all these reasons to enforce anti-violence rules strictly, there is a limit beyond which a rigid application of the workplace rules overreaches into the everyday interactions between co-workers. Those interactions sometimes include hurtful, but easily-corrected, mistakes of which we are all culpable.

Here, too, the Hearings Officer concludes the Appellant made a mistake. She hit Quinones harder than she intended. It hurt enough for Quinones to report the incident four days later. It must not happen again. At the same time, there is nothing in the record to indicate the Appellant struck Quinones with malevolent intent as was found in other Career Service cases of termination for violent acts[4].

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[2] *See*, e.g. "Domestic Violence in the Workplace" (COLORADO PUBLIC RADIO 7/1/03); *THE DENVER POST* article about three employees being shot to death at a bowling alley in Lakewood (1/26/05, B-05); "How to Prevent Violence at Work," FORTUNE MAGAZINE (2/21/05); article concerning violence in the workplace as the second-leading cause of employee deaths. *ROCKY MT. NEWS* (2-8-05, p.13-A); "The Office: An American Workplace" T.V. series (2005); "Workplace Violence: Dealing with a National Epidemic" (Tapeworm Productions, 2001).

[3] "Willful failure of a supervisor employee to enforce this policy will result in disciplinary action against the supervisor, up to and including dismissal." Executive Order #112 @ VII.

[4] *Contrast*, e.g. In Re Wiletsky, #139-03 (2/24/04)(direct threat to shoot); In Re Martinez, #55-02 (8/20/02)(pulled a knife on co-worker, and displayed knives at subsequent pre-disciplinary meeting so as to, place those present in fear); In Re Supple, #41-99 (11/3/99)(held knife to throat of co-worker); In Re Redding, #150-00 (12/6/00)(history of anger management problems, slammed door into head of co-worker). *See also*, the following cases where suspension, rather than termination, was ordered. In Re Day, #12-03 (10/9/03)(10-day suspension was ordered after drunken male Appellant intentionally head-butted, grabbed, and tackled a female co-worker, and the co-worker remained afraid well afterward); In Re Lottie, #385-01 (2/20/02)(15-day suspension ordered after Appellant directly challenged co-worker to fight, co-worker shaken well-after, and Appellant previously disciplined for same conduct); In Re Vigil, #22-02 (4/10/02)(termination reduced to approximately 90-day suspension following incident deemed

The Vigil case, footnote #4, is closest factually to the present case in that Vigil unintentionally harmed a co-worker. However in Vigil, the injured co-worker received a closed-head injury serious enough to require medical attention followed by several days off work. In addition, Vigil and the co-worker at first attempted to conceal the facts. Here, the slap was minor, barely meeting the requirements for the above-cited violations, and no injury resulted.

In addition, the Appellant has always been forthright about the incident. Without the Appellant's admission, the Agency would have had difficulty establishing any violation, because, had the Appellant denied the incident, her testimony could easily have offset Quinones' testimony, and there were no other witnesses to bolster the Agency's case. The Appellant's honesty should also have been a factor in the Agency's determination.

Finally, given the circumstances of this case combined with the Appellant's work record, it is unlikely the Appellant would repeat her mistake, an important factor in determining the degree of discipline.

For reasons stated above, the Hearings Officer concludes Allen's rigid enforcement of #112, CSA 16-50 A. 8), and 16-51 A. 4) was not narrowly tailored to correct inappropriate behavior, was not reasonably related to the seriousness of the offense, and did not take into account the Appellant's past record as required by CSR 16-10.

V. ORDER

The Agency's discipline of the Appellant by termination of her employment is MODIFIED. The Appellant shall serve a one-day suspension without pay, *nunc pro tunc,* May 21, 2004. All other pay and benefits which were forfeited as a result of the termination shall be restored. The Appellant's personnel file shall be modified to delete reference to her termination, and shall be replaced by an entry reflecting her one-day suspension as is consistent with this Decision.

DONE this 3rd day of March, 2005.

Bruce A. Plotkin
Hearings Officer
Career Service Board

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horseplay, where male co-worker threw female co-worker over shoulder, co-worker's head slammed into pillar, and she missed several days of work due to head injury). In all these cases, there was significant injury and/or fear, induced by the Appellant's actions, contrary to the present case. No other case was found resulting in as little physical and emotional consequence to the victim.