CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF COLORADO
Appeal No. 76-17A

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

ROBERT MANCUSO,
Respondent-Appellant,

vs.

DENVER INTERNATIONAL AIRPORT,
and the City and County of Denver, a municipal corporation,
Petitioner-Agency.

Robert Mancuso (Appellant) was a supervisor on the night shift in the Communications Center at Denver International Airport (Agency). One night, he was playing cards with three other subordinate Communications Center employees. Evidently, the cards were not falling his way, and, as a result, he threatened to punch one of the other players in the face. He also threatened retaliation against any one of the players should they report his conduct to higher-ups.

Management eventually found out about the incident. Appellant was placed on investigatory leave by the Agency. While on investigatory leave, Appellant sent an email and placed a phone call to the City Attorney's Office in an effort to obtain legal advice regarding his situation. At no time did he voluntarily identify himself as a city employee and did not advise that he was seeking advice for his personal situation, couching his request for advice in terms referencing a third party. It was only after persistent questioning from the Assistant City Attorney taking his call did Appellant finally admit that he was calling for himself about a situation affecting him.

Eventually the Agency discharged Appellant, finding that he had violated Rules concerning violence in the workplace, retaliation and dishonesty[1]. Appellant appealed his discharge to a hearing officer. The Hearing Officer agreed with the Agency that Appellant had, in fact, violated prohibitions against violence in the workplace and further, that he had threatened retaliation against the other three card players should they have reported his inappropriate threatening behavior. The Hearing Officer, however, failed to sustain the charge of dishonest conduct. The Hearing Office

[1] Appellant's less than forthcoming conversation with the City Attorney formed the basis of the charge of acts of dishonesty (Career Service Rule 16-29(D)).

concluded that Appellant's misconduct warranted a "substantial penalty," but that the penalty of discharge was too severe. He modified the Agency's imposed penalty of discharge downward to a thirty-day suspension without pay.

The Agency has appealed the Hearing Officer's decision claiming that the Hearing Officer has misinterpreted several Career Service Rules at issue. After a complete review of this record, we believe the Hearing Officer has erred in several material respects. These errors compel us to reverse the Hearing Officer's decision and re-impose the Agency's penalty of discharge.

Our Rules provide for five grounds for considering, and hence modifying or reversing, a Hearing Officer's decision. We believe two of those grounds are relevant to this appeal, specifically, Rules 21-21 (B) and (C). These rules give us the authority to reverse a Hearing Officer's decision when we find:

> B. Erroneous interpretation of applicable authority: The Board may reverse a decision based on an erroneous interpretation of any applicable legal authority. A Hearing Officer's interpretation of applicable legal authority is subject to de novo review; or
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> C. Policy-setting precedent: The Hearing Officer's decision is of a precedential nature involving policy considerations that may have effect beyond the appeal at hand.[2]

The Agency's appeal calls into question the Hearing Officer's interpretation of Career Service Rule 16-41 which states:

> 16-41 Purpose of discipline
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> 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.

The Agency claims the Hearing Officer misinterpreted this Rule in four separate ways. First, the Agency claims the Hearing Officer failed to consider the seriousness of Appellant's misconduct. We do not believe, however, that this is the case. The Hearing Officer, at the top of page 12 of his decision, holds that Appellant's misconduct was sufficient to warrant a substantial penalty. We do not believe that the Hearing Officer could have made this finding without having considered the seriousness of Appellant's misconduct. We note, however, that the issue of exactly how serious Appellant's misconduct was, and how substantial a penalty might be warranted under the

[2] This Rule has been renumbered as Career Service Rule 21-21.

circumstances, is not a factual finding to which we are necessarily bound, but rather is an ultimate finding over which we can exercise discretion.

The Agency next claims that the Hearing Officer failed to properly consider, and hence effectuate, the portion of CSR 16-41 which requires the consideration of an employee's past record. Again, technically, the Agency is incorrect. At page 11 of his decision, the Hearing Officer reviewed the Appellant's work record.[3] In that review, the Hearing Officer recognizes that Appellant's work record includes a memorandum of instruction, a Performance Improvement Plan, a supervisor evaluation in which Appellant is rated "below expectations" in the areas of professionalism and interpersonal relations, and a poor evaluation mark regarding his leadership of employees. These issues are raised by the Agency in its brief at pages 5 and 6 as matters the Hearing Officer should have considered.

There is little difference, however, between what the Agency claims the Hearing Officer should have considered and what the Hearing Officer actually did consider. The difference is in the weight or importance the Agency has attached to these four occurrences. The Agency asserts that the Hearing Officer's failure to attach sufficient weight or significance of these prior instances, where Appellant had been placed on notice of the need to improve his interpersonal and leadership skills, renders the Hearing Officer's conclusion the Appellant was capable of reforming his conduct, in error.

While we do not believe that what the Hearing Officer did amounted to a misinterpretation of CSR 16-41, we do agree with the Agency's argument that that the Hearing Officer's ultimate finding, that Appellant's past work record proves he was capable of reform, was error. In doing so, we do not dispute any finding of evidentiary fact made by the Hearing Officer, rather, we come to a different finding regarding the ultimate issue of whether the facts found by the Hearing Officer lead to the conclusion that Appellant was capable of reform. We do not reach that conclusion.

The facts as found by the Hearing Officer are that over the course of four years, Appellant had been placed on notice four separate times that his interpersonal and leadership skills were in-need of improvement. The fact that after four notices, Appellant was still of the belief that it would be acceptable to threaten to punch a co-worker in the face and further threaten retaliation against anyone who would complain about his inappropriate behavior, leads us to conclude that the Agency was well within its rights to conclude that any further notice to Appellant that his conduct was unacceptable and needed correction, whether in the form of coaching, evaluation, or discipline, would be futile.

In a similar vein, the Agency argues that the Hearing Officer erred by misinterpreting CSR 16-41 by having failed to consider the penalty most likely to achieve compliance with the Agency's goal of acceptable conduct in the workplace.

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[3] We observe that this Rule requires the Agency to take into consideration the employee's past record. The Rules does not limit the employer's consideration of the employee's record to instances of formal discipline.

Again, the Agency is technically incorrect. The Hearing Officer plainly made this analysis but came to a different conclusion than the one the Agency claims to be correct under the circumstances. The Agency claims that the Hearing Officer was incorrect when he concluded, essentially, that a lesser discipline than discharge would be appropriate because Appellant understood the importance of not making comments which could be misinterpreted.[4]

The Agency claims, however, that the Hearing Officer erred because the record plainly demonstrates that Appellant never accepted responsibility for his misconduct. There is evidence in the record to support the Agency's argument while there is little, if any evidence in the record to support the Hearing Officer's conclusion that Appellant understood that his conduct was wrong or that he accepted responsibility for his misconduct. As the Agency has noted in its brief, Appellant has persisted in claiming that the was just joking, that his threat to punch his coworker was funny, and that he is a known jokester. These are not the comments of someone who is remorseful or someone who has expressed understanding or acceptance concerning inappropriate conduct that needs to be corrected. Indeed, as we see it, the only glimmer of recognition expressed by Appellant that his threatened punch was wrong came by way of his threat to retaliate against anyone who reported the threat.

The Agency next argues that the Hearing Officer erred in modifying the Agency's discipline because he made no finding that termination was clearly excessive or substantially based on considerations unsupported by a preponderance of the evidence. And indeed, this is the standard hearing officers have regularly applied. The Board has refined this concept by ruling consistently that an agency's discipline is to be sustained as long as it is within the range of alternatives available to a reasonable administrator. *Koonce v. Dept. of Safety*, No. 34-17A, p.7; *Leyba v. Dept. of Safety*, No. 31-16A, p.4; *Kemp v. Department of Safety*, No. 19-13A, p. 7.

First, we agree with the Agency that the Hearing Officer made no specific findings or analysis as to why the modification of discipline was required by this record. We suppose, however, that such reasoning could be inferred from other portions of the Hearing Officer's decision. Nevertheless, we are convinced the Hearing Officer's conclusion was incorrect, failed to follow our precedent, and, as a result, amounted to a misinterpretation of CSR 16-41.

We hold, given this record and the evidentiary factual findings made by the Hearing Officer, that discharge was an appropriate penalty available to a reasonable and prudent administrator and any finding to the contrary made by the Hearing Officer was plain error. In other words, because of the seriousness of the misconduct, which included not only a physical threat of violence, but also a threat of retaliation should anyone have the temerity to "rat out" Appellant, as well as the clear import of eradicating and preventing workplace violence as enunciated in Executive Order 112, the Hearing Officer was obligated to uphold the penalty of discharge.

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[4] Appellant claimed, at hearing, that his threat to punch the co-worker in the face was just a joke that some people misunderstood.

We also believe that failing to uphold the Agency's decision to impose the penalty of discharge under the circumstances presented by this record sets a bad precedent in that it diminishes the import that this City's administration has placed on preventing and eradicating workplace violence as evidenced by the plain language of Executive Order (EO) 112. The version of EO 112 in effect at the time of Appellant's misconduct made it clear that threatening behavior or verbal abuse constituted an act of workplace violence (Section 3.0(b)). Section 6.0 of the EO further provided that any violation of the EO, including a first offense might result in disciplinary action up to and including dismissal.[5] It was an error for the Hearing Officer to hold, by implication, that the penalty of discharge was not within the range of alternatives available to a reasonable and prudent administrator, and said ruling sets a bad precedent by diminishing the seriousness with which the City considers violations of Executive Order 112.

The Agency also urges us to overturn the Hearing Officer's finding that it failed to prove that Appellant had violated CSR 16-29(D) which prohibits any act of dishonesty. The Agency claims that Appellant violated this rule when he attempted to contact the City Attorney's Office to obtain advice about his potential discipline, without identifying himself as a city employee and without disclosing the fact that he was making the contact to seek advice for his own personal situation.

The Hearing Officer determined that the Agency failed to prove this charge because Appellant, in his two attempted communications with the City Attorney's Office disclosed his identity on both occasions, that is, the attempted contacts did not hide the fact that they were coming from a Robert Mancuso. That Appellant did not hide the fact that he was Robert Mancuso, according to the Hearing Officer, absolved Appellant of the dishonesty charge. We believe this is both a cramped and incorrect interpretation of CSR 16-29(D).

We believe, based on the evidentiary facts found by the Hearing Officer, that the Appellant was deceptive in his contacts with the City Attorney's office, and that this deceptive conduct was sufficient to prove a violation of CSR 16-29(D). The record reflects that while Appellant may not have hidden his name. he hid the true purpose of his contacts for as long as he could hold out the charade. He never identified himself as a City employee until he was pressed, repeatedly, by the Assistant City Attorney taking his call. He never admitted that he was calling to seek advice on his personal situation, again, until pressed by the Assistant City Attorney.

The record reflects that the Appellant contacted the City Attorney's Officer to obtain information about a situation he heard about (Hearing Officer decision, p. 8); failing to initially disclose this third person he heard about was actually the Appellant

[5] Section 5.0(b) of EO 112 provided that an employee was obligated to immediately report any act or threat of violence, meaning that Appellant's threat to retaliate against any employee that reported his misconduct placed his co-workers in the untenable position of either reporting his misconduct and potentially suffering his retaliation, or withholding his report of his misconduct and risk consequences for violating Section 5.0 of the Executive Order.

himself. We conclude that Appellant, in his contact with the City Attorney's Office, was less than forthcoming, that he failed to disclose critical information that any reasonable person would have known needed to be disclosed, and that he did so intentionally and knowingly for the purpose of attempting to obtain information he otherwise would not have been entitled to receive. This dishonesty by omission was sufficient to support a finding that Appellant violated CRS 16-29(D).[6]

For the above reasons, the Hearing Officer's decision to modify the Agency's discipline to a thirty-day suspension is REVERSED. The Agency's originally imposed discipline of discharge is re-instated and affirmed.

SO ORDERED by the Board on July 19, 2018, and documented this 6th day of September, 2018.

BY THE BOARD:

Neil Peck, Co-Chair

Board Members Concurring:

Karen DuWaldt

Tracy Winchester

[6] We would have upheld the discharge of Appellant even if we had not decided this issue in favor of the Agency.