

HEARINGS OFFICER, CAREER SERVICE BOARD, CITY AND COUNTY OF
DENVER, STATE OF COLORADO

Appeal No. 57-02

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEAL OF:

Appellant: Tobias Ortegon

And

Department of Parks and Recreation

NATURE OF APPEAL

Appellant Tobias Ortegon is a Career Service Employee who has challenged a one week suspension from his position as a Recreation Coordinator with the Department of Parks and Recreation (Agency). The Agency suspended Appellant for five working days, Tuesday March 5th, 2002, through Monday March 11th, 2002, for conduct occurring on November 14th, 2001, and November 23rd, 2001, at the La Alma Recreation Center.

The Agency contends Appellant violated Career Service Rules (CSR) § 16-50 8), 18), and 20); § 16-51 2), 5), and 11). The Appellant contends the Agency violated CSR § 16-10; § 16-20 and restates the CSR.

INTRODUCTION

A hearing on this appeal was held before Michael A. Lassota, Hearings Officer for the Career Service Board. Appellant was present represented by Michael J. Belo, Esq. The Agency was represented by Robert D. Nespor, Esq., with Theresa Waters Rash serving as advisory witness for the Agency.

The following witnesses were called and testified at the hearing: Dino Perry, Rance Reid, Gabriel Moreno, Ronnie Gene Sanders, Theresa Waters Rash and Appellant Tobias Ortegon. Exhibits 1-8, 10-19, A and B were admitted into evidence and considered in this decision.

ISSUES ON APPEAL

Whether the Agency proved by a preponderance of the evidence that the Appellant violated provisions of the Career Service Rules?

If so, whether Appellant's discipline was reasonably related to the seriousness of the offense, considering all of the circumstances, as required by the Career Service Rules?

Whether the Agency violated the Career Service Rules alleged by Appellant?

JURISDICTION

The alleged conduct which gave rise to the disciplinary action by the Agency occurred on November 14th and November 23rd, 2002, at the La Alma Recreation Center. A pre-disciplinary meeting was held on February 15th, 2002. Appellant was notified of disciplinary action, a five working day suspension beginning March 5th, through March 11th, 2002, on March 4th, 2002. Appellant filed his appeal with the Hearings Office on March 14th, 2002.

Based upon these facts, I find that this appeal has been timely filed. And, under CSR §§ 19-10 (b) and 19-27, I have authority to affirm, reverse or modify the actions of the Agency.¹

RELEVANT FACTS

1. At all times relevant to this disciplinary action Appellant was an employee of the Agency assigned to the La Alma Recreation Center as a Recreation Coordinator.

¹ CSR § 19-10(b) provides:

Actions subject to Appeal

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.

- b) Actions of an appointing authority: Any action of an appointing authority resulting in dismissal, suspension, involuntary demotion, disqualification, layoff, or involuntary retirement other than retirement due to age which results in alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

CSR § 19-27 provides:

The Hearings Officer shall issue a decision in writing affirming, modifying, or reversing the action, which gave rise to the appeal. This decision shall contain findings on each issue and shall be binding upon all parties.

2. On November 14th, 2002, at approximately 5:30 p.m., Appellant was involved in an altercation with Raymond Sanchez a 12 year old frequent user of the La Alma Recreation Center.
3. Before the altercation occurred, Sanchez had been tormenting and taunting Appellant throughout the afternoon of that day.
4. Appellant left a recreation center van running (engine on) while he gathered up the girl's volleyball team he was going to take to a game at another recreation center.
5. Raymond Sanchez got into the driver seat of the running van, locked the driver side door and put his hands on the steering column leading Appellant to believe Sanchez was going to drive away. These actions further taunted and tormented Appellant.
6. Appellant ran around to the passenger side door and opened it before Sanchez could lock it.
7. Appellant reached across the passenger seat, grabbed Sanchez by the shirt with one hand and removed the van keys from the ignition with the other.
8. As Sanchez struggled to free himself from the grasp of Appellant, Appellant let go causing Sanchez to fall out of the driver seat of the van hitting his head and back.
9. During the time Sanchez was on the ground, Sanchez was alleged to have been kicked and hit by Appellant. It is unclear how Appellant got from the passenger side of the van to where Sanchez was.
10. All witness versions of these events was different.
11. Two of the witnesses, Dino Perry and Gabriel Moreno gave substantially different versions of these events.
12. On November 23rd, 2002, Appellant allegedly threatened Gabriel, a coworker, for filing an incident report regarding Appellants actions during the incident with Sanchez.
13. Appellant was given notice disciplinary action was being contemplated against him on February 5th, 2002.
14. Appellant had a pre-disciplinary hearing on February 15th, 2002, at which Appellant was represented by counsel.

15. Appellant was notified on March 4th, 2002, he was being suspended without pay for five working days during the period from March 5th, 2002, through March 11th, 2002.
16. Appellant filed his appeal on March 14th, 2002.

DISCUSSION AND CONCLUSIONS OF LAW

As a thirteen year employee of the Agency Appellant has Career Status as a Career Service Employee and may not be disciplined or dismissed without cause.² Appellant is accused of violating the following Career Service Rules, Executive Orders, and Departmental Rules and Regulations:

§ 16-50 Discipline and Termination

A. Causes for Dismissal.

The following may be cause for dismissal of a career service employee. A lesser discipline other than dismissal may be imposed where circumstances warrant. It is impossible to identify within this rule all conduct which may be cause for discipline. Therefore, this is not an exclusive list.

- 8) Threatening, fighting with intimidating or abusing employees or officers of the City and County of Denver for any reason, including but not limited to: intimidation or retaliation against an individual who has been identified as a witness, as a party, or as a representative of any party to any hearing or investigation relating to any disciplinary procedure, or a violation of a city, state or federal rule, regulation or law,
- 18) Conduct which violates an executive order which has been adopted by the Career Service Board.

EXECUTIVE ORDER No. 112, Violence in the Workplace, Section II, Paragraphs IIA, and IIB.

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

² CSR § 5-62 provides:

Employees in Career Status

An employee in career status

- 1) may be disciplined or dismissed only for cause, in accordance with Rule 16, DISCIPLINE.

- A. Intimidating, threatening or hostile behaviors, physical assault, vandalism, arson, sabotage, unauthorized use of weapons, bringing unauthorized weapons onto city property or other acts of this type clearly inappropriate to the workplace.
 - B. Jokes or comments regarding violent acts, which are reasonably perceived to be a threat to imminent harm.”
- 20) Conduct not specifically identified herein may also be cause for dismissal.

§ 16-51 Causes for Progressive Discipline

A. The following unacceptable behavior or performance may be cause for progressive discipline. Under appropriate circumstances, immediate dismissal may be warranted. Failure to correct behavior or committing additional violations after progressive has been taken may subject the employee to further discipline, up to and including dismissal from employment. It is impossible to identify within this rule all potential grounds for disciplinary action; therefore, this is not an exclusive list.

- 2) Failure to meet established standards of performance including either qualitative or quantitative standards.

PERFORMANCE ENHANCEMENT PROGRAM (PEP) JOB RESPONSIBILITIES:

COMPLIANCE WITH WORK RULES: Compliance with Recreation Division and Work Group rules, policies and procedures; Departmental rules, policies, and procedures; Career Service Authority rules; Executive Orders. (A written reprimand, or more severe disciplinary action, constitutes a “needs improvement” in that particular area of expected accomplishment).

WORKING RELATIONSHIPS: Conveys positive and professional image; maintains smooth working relationships; supports the goal of any project or job. “Public Interactions: Greets in a friendly manner; demonstrated tact and diplomacy in negotiations or confrontations with others; handles complaints or suggestions in a timely manner, and routinely seeks input from patrons.”

- 5) Failure to observe department regulations.

PARKS AND RECREATION PERSONNEL POLICIES NO. 1-8, Scope of Departmental Policies, and No. 1-20, Violence in the

Workplace, the first of which adopts all Mayor's Executive Orders, and second which specifically adopts Executive Order 112 and emphasizes the Department's commitment to a workplace free of violence, and states that participants have the right to expect that they will be safe when they are in our facilities. It delineates the supervisor's responsibility for ensuring that all subordinates have been briefed, and states that all Parks and Recreation staff will attend workplace violence training.

- 11) Conduct not specifically identified herein may also be cause for progressive discipline.

The City Charter, §C5.25 (4) and CSR §2-104 (b)(4) require the Hearing Officer to determine the facts in this matter "de novo". The Colorado Courts have held that this requires an independent fact-finding hearing considering evidence submitted at the *de novo* hearing and a resolution of the factual disputes. *Turner v. Rossmiller*, 35 Co. A. 329, 535 P.2d 751 (Colo. App., 1975).

The party advancing a position or claim, in an administrative hearing like this one, has the burden of proving that position by a "preponderance of the evidence". To prove something by a "preponderance of the evidence" means to prove that it is more probably true than not (Colorado Civil Jury Instruction, 3:1).³ The number of witnesses testifying to a particular fact does not necessarily determine the weight of the evidence (Colorado Civic Jury Instruction 3:5).⁴ The ultimate credibility of the witnesses and the weight given their testimony are within the province of the Administrative Law Judge or Hearing Officer. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). As the trier of fact, the Hearing Officer determines the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

In its notification of suspension letter, the Agency claims Appellant violated the numerous Career Service Rules outlined above. Therefore, the Agency has the burden of proving the allegations contained in the letter of dismissal by a preponderance of the evidence.

The first CSR Appellant is alleged to have violated is § 16-50 8) regarding threatening, fighting with intimidating or abusing officers or employees of the City. Theresa Waters Rash, Co-Deputy Manager of Recreation testified she made the decision regarding the type and amount of discipline that was appropriate for Appellant. When asked specifically how Appellant violated this rule, Rash provided no examples. Rash gave no explanation other than there was no doubt Appellant violated this rule. Without

³ The notes on use of Instruction 3.1 state: Generally, in all civil cases, "the burden of proof shall be by a preponderance of the evidence,..." citing C.R.S. § 13-25-127.

⁴ The content of this instruction was approved as an instruction in *Swain v. Swanson*, 118 Colo. 509, 197 P.2d 624 (1948). The rule stated is also supported by *Green v. Taney*, 7 Colo. 278, 3P. 423 (1884) and C. McCormick, EVIDENCE § 339, at 957 (E. Cleary 3 ded, 1984).

specifics, it is impossible for me to determine whether or not Appellant violated this rule. The Agency's allegation Appellant violated this rule is denied.

Next the Agency alleges Appellant violated § 16-50 18) regarding conduct which violates an adopted executive order: Specifically, Appellant is alleged to have violated Executive Order No. 112, Violence in the Workplace, Section II, Paragraphs IIA, and IIB. This allegation stems from the November 23rd, 2001, conversation between Appellant and Gabriel Moreno in Moreno's office. Moreno alleges Appellant threatened him when Appellant said to Moreno; "when word gets out, it would not be too cool." When cross examined regarding how that phrase was a threat or perceived threat, Moreno was unable to elaborate. Also, Appellant said to Moreno; "gente doesn't do that to gente." When questioned regarding the meaning of that phrase, Moreno testified it could mean just about anything. Appellant denied ever threatening Moreno. Appellant testified he was merely questioning Moreno because he believed Moreno was not telling the truth about the incident in his report.

Overall Moreno's testimony was not credible. It was inconsistent with his written report of November 16th, 2001, about the incident, concerning key details and inconsistent with other witness testimony. Moreno testified he put everything important he saw or heard about the incident in his report. When cross-examined, Moreno testified the van was not running. His written report says it was. After more questioning, Moreno testified his written report was "false about the van running." Moreno's report says the victim called Appellant names. During testimony, Moreno never mentioned any name calling. When questioned about his association with Dino Perry, another witness, Moreno said he only knew him from officiating basketball games at the recreation center and that he didn't know him socially. Perry testified he knew Moreno most of his life and they had socialized together. Moreno testified he grabbed Appellants arm to keep him from hitting Sanchez again. Perry testified he never saw Moreno grab Appellants arm or in any way try to restrain him. Because I determined Moreno's testimony was not credible, the agency did not prove, through the evidence presented, Appellant threatened Moreno. The allegation Appellant violated § 16-50 18) is denied.

The Agency alleges Appellant violated § 16-50 20) regarding conduct not specifically identified herein may also be cause for dismissal. This is a catchall provision that has no relevance to this appeal and is denied.

Appellant is also alleged to have violated § 16-51 2) regarding failure to meet established standards of performance including either qualitative or quantitative standards. The Agency alleges this CSR was violated by Appellant not conforming to his Performance Enhancement Program (PEP) job responsibilities. The testimony from Theresa Rash was Appellant did not comply with work rules when he hit Sanchez and when he did not report the incident. Appellant did not refute the fact that he did not report the incident. In this appeal, the incident has been interpreted two different ways. Appellant testified he fell on Sanchez unintentionally. All witness versions of what happened were different; however, the premise of these witnesses was Appellant kicked and hit Sanchez. It is unimaginable to me that Appellant would not immediately report an

incident like this, which could and was interpreted in different ways, to set the record straight and clear himself of wrongdoing.

The Agency alleges Appellant violated the agency policy regarding smooth working relationships when he threatened Moreno. As previously explained the agency did not prove Appellant threatened Moreno. The agency did prove Appellant violated the working relationships policy concerning public interactions.

“Public Interactions: Greets in a friendly manner; demonstrated tact and diplomacy in negotiations or confrontations with others; handles complaints or suggestions in a timely manner, and routinely seeks input from patrons.”

Even considering all the evidence in a way most favorable to Appellant, specifically that this incident was an accident and he unintentionally fell on Sanchez, there was no demonstration of tact in this confrontation. Appellant is 33 years old and Sanchez was 12 years old at the time of the incident. I cannot conceive of a set of circumstances where a 12 year old should be treated the way Sanchez was by Appellant, regardless of the fact Sanchez taunted him during the day of the incident. The allegation Appellant violated CSR § 16-51 2) is affirmed.

Next the Agency alleges Appellant violated § 16-51 5) by failing to observe the departmental regulation adopting Executive Order No. 112, Violence in the Workplace. As previously explained, the Agency did not prove Appellant threatened Moreno. The allegation Appellant violated this CSR is denied.

The allegation Appellant violated the catch-all provision § 16-51 11) is also denied for the same reason § 16-50 20) was denied.

JUSTNESS OF DISCIPLINE

The remaining issue is whether the discipline imposed is just given the circumstances, whether it is reasonable. The Agency bears the burden of establishing by a preponderance of the evidence, that it had just cause for the disciplinary action. *In the Matter of the Appeal of Vernon Brunzetti*, Appeal No. 160-00 (Hearing Officer Bruce A. Plotkin, 12-8-00) After the Agency meets this burden, the question then becomes; was the degree of discipline reasonably related to the severity of the offense in question. *In the Matter of Leamon Taplin*, Appeal No. 35-99 (Hearing Officer Michael L. Bieda, 11-22-99).

While the Hearing Officer may defer to the discipline imposed by the Agency, he is required to make an independent, *de novo*, finding and determination as to the reasonableness of the discipline consistent with CSR 16, DISCIPLINE.

The purpose of Rule 16 is stated in § 16-10:

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.

In § 16-20 1) the appointing authority or designee is authorized to impose discipline from as slight as a verbal reprimand to as severe as dismissal. In § 16-20 2) the instruction is:

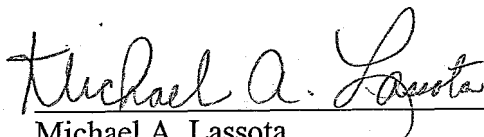
Whenever practicable, discipline shall be progressive. However, any measure or level of discipline may be used in any given situation as appropriate. This rule should not be interpreted to mean that progressive discipline must be taken before an employee may be dismissed.

Theresa Rash testified she made the disciplinary decision to suspend Appellant for five days and that he attend and complete both an anger management course and a course in supervising children and youth. The basis for this decision was all the written documents concerning the incident including all witness statements. Also, no police report was filed, there was no complaint from the parents, and Appellant, a 13 year employee, had no previous disciplinary action against him.

DECISION AND ORDER

Based on the Discussion and Conclusions of Law, the Agency's decision to discipline Appellant is affirmed. The degree of discipline is reasonably related to the severity of the offense and is affirmed.

Dated this 10th, day of June, 2002.



Michael A. Lassota
Hearing Officer
Career Service Board