FINDINGS AND DECISION OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE UNDER DELEGATION FROM THE CIVIL SERVICE COMMISSION

JOHN E. JONES Appellant, **v.** **SEATTLE PARKS AND RECREATION TECHNOLOGY** Respondent.	)	**File No. CSC-12-01-005**

Introduction

The Acting Supervisor of the Seattle Parks and Recreation Department terminated the Appellant, John E. Jones. The Appellant timely appealed his termination to the Civil Service Commission. The Commission delegated the matter to the Hearing Examiner, pursuant to SMC 4.04.250. The hearing was held before the undersigned Deputy Hearing Examiner on October 9, October 11, November 16, November 19, and November 20, 2012. The record was held open through December 7, 2012, to receive written closing statements from the parties. Represented at the hearing were the Appellant, John E. Jones, by Preston Hampton; and Respondent, Seattle Parks and Recreation Department, by Fritz Wollett, Assistant City Attorney.

After due consideration of the evidence elicited during the hearing the following shall constitute the findings of fact, conclusions and decision of the Hearing Examiner on this appeal.

Findings of Fact

1. The Appellant, John E. Jones, has been employed by the Seattle Parks and Recreation Department (Department) since 2003. On June 18, 2012, the Department issued a notice of termination to the Appellant.

2. The notice of termination is shown in Dept. Ex. 1. The notice stated that the Appellant had been found to have violated Department Policy and Procedure Paragraph 3.1.1 and City Personnel Rule 1.1.3 concerning harassment of employees.

3. The Seattle Conservation Corps is a unit of the Department, whose described mission is to train *"formerly troubled people for viable, living-wage jobs...The Corps provides homeless adults opportunities to train and work in a structured program that provides them with job skills, and it carries out projects that benefit our citizens and our environment."* Dept. Ex. 10, p.243.

4. Corps membership is offered to persons who have been homeless. Many members have had additional challenges in their lives, e.g., past drug or alcohol addiction, and other behaviors which have prevented them from steady employment and housing. Corps members are provided with counseling and other supportive services to address these challenges. Dept. Ex. 10, p. 252.

5. Persons admitted to the program agree to a one-year employment assignment, and are assigned to a work crew which is directed by a supervisor. The Corps crews are utilized in a wide variety of City projects for the Parks Department and for other agencies. Typical Corps projects, such as park clean-up or installation of landscaping, are described in more detail at Dept. Ex. 10.

6. The Corps "Specialist" is a position which entails more responsibility than the position of Corps member. A Specialist receives a higher hourly pay than does a Corps member. The "Crew Lead" position has more responsibility than the Specialist position, and assumes responsibility for crews in the absence of the supervisor. The Crew Lead receives higher pay than does the Specialist.

7. The Corps "Supervisor" position is described in Dept. Ex. 14. The Supervisor performs a "full range of supervisory responsibilities including performance evaluation and discipline." The Supervisor's duties include the training, evaluation, discipline and supervision of Corps members.

8. The Appellant was hired into the Corps as a temporary worker in February of 2003. He was appointed to the position of Crew Lead in April of 2005, and promoted to the position of Supervisor in 2008. During his tenure, the Appellant's work performance has been praised by supervisors and clients; he is known for having a strong work ethic and an ability to successfully complete projects.

9. In 2006, two female Corps members complained that the Appellant had directed comments and gestures at each of them that were sexual in nature. One woman stated that the Appellant's comments started about two weeks after she began working at the Corps and continued regularly after that. The complainant noted that the Appellant made gestures such as grabbing his heart, stopping and staring as she walked by, and made comments about her appearance. Dept. Ex. 3, page 66. She started to avoid him "as much as possible." Id. She also noted that, later, the Appellant asked her if "I had snitched on him and that they wouldn't tell him who told but that he would find out." After that, she noted that the Appellant was polite and had made no more gestures or comments of a sexual nature. Id. The other complainant reported that the Appellant had approached her on a daily basis to make comments about her, and comments on his sex life. Dept. Ex. 3, page 67.

10. After the 2006 complaints, the Appellant's Crew Chief spoke to him about the complaints and told him to refrain from making comments or engaging in conduct that could be perceived as sexual in nature. After the Appellant spoke with his crew chief, the complaints ceased. Several women Corps employees, including one of the complainants, reported that the Appellant had asked them if they had "ratted" him out. Dept. Ex. 3 page 70.

11. The complaints were investigated by the Department, and a fact-finding hearing was held. The Appellant denied the allegations. On May 19, 2006, the Appellant's supervisor, Cathi Andersen, issued a memo and a written verbal warning to the Appellant, finding that he had violated the Department's Workplace Expectations. Dept. Ex. 3, page 71. The Appellant was told to meet with his Crew Chief at least twice a month for a six-month period "to discuss the sexual harassment policy and how to apply it to your workplace conduct." The Appellant's written response to the written verbal warning stated that he felt the decision was wrong. Dept. Ex. 3, page 70.

12. The Appellant completed an eight-hour training course on sexual harassment on September 12, 2006. The training included discussion of quid pro quo sexual harassment, and hostile environment harassment.

13. In February 2012, two female Corps crew members, Terenia Chappelle and Ahleigh Rhodes, complained about the Appellant's conduct. Both women initially complained to Trudi Loubet, a mental health professional who is retained by the Department to provide counseling services for Corps members. The complaints alleged that the Appellant had pursued both women for romantic or sexual relationships. Ms. Loubet reported to Cathie Andersen that two female Corps members had complained about the same supervisor. Ms. Loubet did not identify the complainants to Ms. Andersen, in order to preserve the confidentiality of her communications with the two women.

14. An investigation into the allegations was initiated by the Department, conducted by Department investigator Leonard Sims. Both complainants agreed to be identified and to be interviewed as part of the investigation. Mr. Sims interviewed the complainants and the Appellant, and other witnesses whose statements are shown in Dept. Ex. 2.

15. During the pendency of the investigation, the Appellant was administratively re-assigned to a different work crew.

16. Complainant Terenia Chappelle rejoined as a Corps member in August 2011. She had also been in the Corps for a few months in 2002 and 2003, when the Appellant was also a crew member. Ms. Chappelle reported to Tony Lowe. Ms. Chappelle has been a victim of sexual abuse and has been involved in prostitution. Because of this history, Ms. Chappelle believes she finds it difficult to set appropriate boundaries and avoid being a victim of sexual abuse.

17. In February of 2012, Ms. Chappelle and the Appellant agreed that he would repair a vehicle for her (one that she wished to purchase) and in exchange she would give him a different vehicle that she owned. The Appellant is known for his mechanical skills with vehicles. There is some dispute as to who was to pay for parts needed for the repairs. However, the Appellant repaired the car and she met him to pick it up. He told her that her brakes were bad and needed to be fixed. When she told him that she couldn't afford that, the Appellant said "what about a tune up?" She again said that she couldn't afford it. The Appellant then said that he wasn't talking about the car and that she "didn't see that one coming huh?" Ms. Chappelle was

surprised and felt embarrassed, but laughed and thought perhaps that was the end of that discussion. However, the Appellant again asked whether she wanted to be "tuned up." Ms. Chappelle said "maybe." When they arrived at her apartment so that he could pick up the other car, the Appellant asked if they could go inside her apartment and "do this," and also said that they could get a motel room. Ms. Chappelle told him no, that she had her son at home with her; the Appellant told her that was "ok," but she then told him "no." Chappelle testimony; Dept. Ex. 4, pages 133-135.

18. Ms. Chappelle then began avoiding the Appellant as much as possible at work. The Appellant again asked her at work when they were going to be able to "do this" and she told him that she couldn't get a babysitter. During a two-week period, he called her and sent texts, and several times told her that she should get the daycare issue fixed so that "we" could get her the Specialist position. His last text to her was on February 9, 2012, in which he asked what she was doing that weekend and "I hope you let it be me." Dept. Ex. 8, page 231.

19. Eventually, Ms. Chappelle decided that she did not have to tolerate his comments, and went to Crew Supervisor Greg Evans to complain about the Appellant's "tune-up" statement and told Mr. Evans that "giving in" might help her job status. After her report to Mr. Evans, she noticed that the Appellant behaved differently and that he ceased asking her out.

20. Aleigh Rhodes began working in the Corps in February or March of 2012. Soon after she began her employment, the Appellant arranged to pick her up from a bus stop and drive her to the work location. He would talk to her about his former marriage, and would suggest that she go out with him. This continued for several months, both at work and in the car, and he sent her a text message about going to a comedy club. Because alcohol is served at the club, and Ms. Rhodes was recovering from alcohol abuse, she was surprised that the Appellant, a supervisor, would invite her to the club. He repeated this invitation several times, and Ms. Rhodes did not assent. On at least one of their rides, the Appellant told her not to tell anyone about their conversations, because he could get into trouble.

21. Eventually, Ms. Rhodes told him she was not interested, and she started to avoid him, getting a ride from another co-worker. However, on one occasion, she invited the Appellant to her house, when she was giving a birthday party for one of her children, and she invited the Appellant and his daughter. The Appellant arrived without his daughter, gave money to Ms. Rhodes's children, and left. On another occasion, Ms. Rhodes brought her child's father with her to a meeting with the Appellant, and after that, the Appellant ceased inviting her out.

22. In his interview with Ms. Sims, the Appellant denied that he made the "tune-up" comments to Ms. Chappelle as a sexual overture, and denied making any statements about getting a motel room or going to her apartment to "do this." He denied asking Ms. Rhodes to a comedy club, but said that he had merely indicated that he liked comedy clubs and for her to let him know if she were going, since he'd like to go too. He also stated that he did not text, and that the text messages on his City issued phone were sent by his 13-year-old daughter. He stated that he did not ask people at work to go out. Dept. Ex. 2, pages 35-41.

23. Mr. Sims completed his investigation and prepared a "Final Investigative Summary;" Ex. 2, page 4. Mr. Sims concluded that the complainants were credible, and that their complaints were consistent with what they had told other witnesses. Mr. Sims also concluded that the Appellant's denial of the allegations was not credible, citing the Appellant's cell phone records that included texts to one of the complainants. The investigator concluded that the Appellant had violated the City's Anti-Harassment policies and the Department's Workplace Expectations.

24. Following the investigation, the Department Division Director submitted a May 21, 2012 recommendation to Superintendent Williams that the Appellant be terminated.

25. On May 31, 2012, the Superintendent held a Loudermill hearing with the Appellant. Also present at the Loudermill were the Appellant's representative, Mr. Hampton, and HR Director Finnegan and Labor and Employee Relations Manager Josef. Ms. Josef's notes of the meeting appear at Dept. Ex. 9. At the Loudermill, the Appellant stated that he had not tried to read the Division Director's letter recommending termination, because he cannot read well, and reads at about a third grade level. The letter was read out loud to the Appellant.

26. During the Loudermill, the Appellant denied having engaged in the conduct reported by the complainants. The Superintendent asked the Appellant about the text messages, including those that had been received by Ms. Chappelle, which had been sent from Appellant's City-issued phone. The Appellant denied having sent or received any text messages on the phone, and at one point during the meeting, claimed that his teenage daughter must have sent the messages from the phone, because he did not know how to text.

27. Ms. Josef transcribed the text messages from the phone; Dept Ex. 8, page 226. Ms. Josef also called one of the numbers that had received numerous messages from the Appellant's phone, and spoke with the person who answered the phone. That person identified herself as the Appellant's girlfriend. During the Loudermill, the Appellant did not offer any further explanation as to why the texts appeared to be sent to his girlfriend.

28. Superintendent Williams ultimately decided to terminate the Appellant, and issued his decision approximately a month after the Loudermill hearing, on June 18, 2012. Mr. Williams noted at hearing that it took him some time to make this decision and that he did not wish to lose a good employee. He chose to terminate the Appellant in part because he believed that the Appellant could not be trusted to cease engaging in sexually inappropriate behavior while employed by the Department.

29. The record shows that a number of other Parks Department employees have been disciplined for sexual harassment. App.Ex. 2. But except for the Appellant, none of these employees was terminated, including Andre Franklin; see App. Ex. 2, page 31. Although Franklin's director recommended termination, the Department head modified that to demotion. Of the employees actually disciplined for sexual harassment, the Appellant was the only supervisor who was disciplined more than once for sexual harassment.

30. The record indicates that Corps employees have from time to time dated each other, or even gotten married. According to the Appellant's information, flirting and dating among employees is not uncommon.

31. The June 18, 2012 Notice of Discharge stated that the Appellant had violated *"the Department's Policy and Procedure regarding Sexual Harassment: Paragraph 3.11" and that he had also violated City Personnel Rule 1.1., Workplace Harassment, 1.13. Nondiscrimination: Harassment of an individual is illegal conduct."*

32. The Notice includes the statement that "*It was also established that you knowingly used your City issued cell phone for personal for over 3600 minutes and overage charges in violation of the City's Cell phone usage policy. You were given an invoice for your excessive use in the amount of $1472.96."* At a prehearing conference, the Department confirmed that it was not relying on the Appellant's alleged violation of the City Cell phone usage policy as a basis for the termination decision and that the overuse charge was not part of the disciplinary decision. The Examiner therefore ruled that the challenge to the $1472.96 overuse charge was not within the scope of the Examiner's jurisdiction, and this issue was dismissed from the appeal.

33. The Department's Sexual Harassment Policy is shown at Dept. Ex. 5. Paragraph 3.11 states that: *"Employees will be free from sexual harassment from co-workers, supervisors, managers, elected City officials and officers, and non-employees conducting business with the City."*

34. City Personnel Rule 1.13 provides that: *It is the policy of the City of Seattle to provide a work environment for its employees that is free from discrimination and promotes equal employment opportunity for and equitable treatment of all employees. Harassment of an individual is illegal conduct and a violation of this Rule. The City of Seattle will not tolerate harassment of its employees by coworkers, supervisors, managers, officers of the City or from non-employees conducting business with the City.*

35. Personnel Rule 1.3.3 provides in part:

> *C. A regular employee may be suspended, demoted or discharged only for justifiable cause. This standard requires that:*
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> 1. *The employee was informed of or reasonably should have known the consequences of his or her conduct;*
> 2. *The rule, policy or procedure the employee has violated is reasonably related to the employing unit's safe and efficient operations;*
> 3. *A fair and objective investigation produced evidence of the employee's violation of the rule, policy or procedure;*
> 4. *The rule, policy or procedure and penalties for the violation thereof are applied consistently; and*

5. *The suspension or discharge is reasonably related to the seriousness of the employee's conduct and his or her previous disciplinary history.*

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to delegation from the Civil Service Commission under SMC 4.04.250. Under Civil Service Commission Rule 5.31, the Department must show by a preponderance of the evidence that there was justifiable cause for the suspension, as described in Personnel Rule 1.3.3.C.

2. The first element of justifiable cause is whether the employee was informed of, or reasonably should have known the consequences of his or her conduct. As a City employee and supervisor, the Appellant had access to and awareness of the policies and the consequences for violating them. The fact that he told Ms. Rhodes not to tell others of their conversations also indicates that he was actually aware that his conduct violated policies and could result in discipline. Finally, because of the 2006 written verbal discipline, and the training on sexual harassment that he was required to take, he should reasonably have known that his conduct would result in discipline up to and including termination.

3. The Department cited Department Policy 3.1.1, and City Personnel Rule 1.1.3, which prohibit workplace harassment, including sexual harassment, by employees. These policies are reasonably related to the safe and efficient operation of the Department and City, by prohibiting conduct which would harm employees and which could expose the City to legal liability for such conduct, since sexual harassment in the workplace is unlawful.

4. The next issue is whether the investigation was fair and objective and produced evidence of the Appellant's violation of the policies. The Appellant argues that the investigation was flawed and biased against him, because only females were interviewed and the Appellant's supervisors were not informed about the investigation or interviewed. The investigator interviewed the complainants and the Appellant, as well as the employees listed in his report. The assertion that he only interviewed female employees is not true, although the more important question is whether he interviewed witnesses who possessed information relevant to the complaints, not the gender of the witnesses.

5. The evidence here shows that all witnesses with relevant knowledge were contacted and interviewed by the investigator. The Appellant argues that there were others who should have been interviewed, e.g., the Appellant's immediate supervisors. At hearing, the Appellant presented testimony from supervisors and from employees or others who had positive opinions concerning the Appellant's character or the quality of his work, but who lacked knowledge about the underlying incidents that led to the discipline. At least one of the Appellant's supervisors objected to the fact that he was not allowed to participate in the investigation process or in management's decision to impose discipline. But the evidence in this record shows that the investigation omitted no witnesses who possessed information relevant to the complaints.

6. The record supports the factual findings of the investigation, including the Appellant's conduct with the complainants. The Appellant did not testify at hearing, but during the investigation and Loudermill hearing he consistently denied having made statements of a sexual nature or committing sexual harassment. However, the complainants' testimony at hearing was credible and their statements were consistent with others' contemporary descriptions of the complainants' statements. By contrast, the Appellant denied that he sent text messages, including to a complainant, from his phone. This assertion was simply not true, a fact which undermined his credibility regarding the interactions between himself and the complainants.

7. The Appellant's behavior toward Ms. Chappelle and Ms. Rhodes violated the City's policies concerning sexual harassment. He repeatedly asked the women for dates and/or sex, even though neither of them agreed to his requests and declined them. He suggested to Ms. Chappelle that he could help her get promoted if she had sex with him. Both women began attempting to avoid him at work because of his conduct. The record shows that both women were, at least initially, reluctant to complain about him or to him directly, but both of them ultimately did so. There is no evidence to show that his conduct was anything but anything but unwelcome to them.

8. The next issue is whether the policies have been consistently applied and whether the penalties for violation of the policy have been consistent. The Department has disciplined several employees for violating policies regarding sexual harassment, but the Appellant is the only Parks employee shown in the record to have been terminated. The Appellant argues that no other employees (including Andre Franklin, whose case seems particularly egregious) were terminated as discipline for sexual harassment. But the Department is correct in pointing out that the Appellant's case is distinguishable from all others in the record, as it involved repeat sexual harassment by a supervisor toward employees in a subordinate status, and that the supervisor appeared likely to repeat this misconduct in the future. The Appellant also argued that Corps employees frequently engage in flirtations or relationships; but the evidence does not show that sexual harassment by Corps members has been tolerated by the Department. The policies at issue in this case have been consistently applied and the penalties have also been consistent.

9. The discharge must be reasonably related to the seriousness of the employee's conduct and his previous disciplinary history. The Superintendent testified that he had struggled with the decision to terminate, as opposed to a lesser discipline. In the end, the Department relied on several factors in its decision to terminate, rather than suspend or demote, the Appellant. These included the Appellant's supervisory status; his previous violation of the workplace harassment policies; his denial that his conduct violated the policies, which led the Department to conclude that he was likely to violate again; and the City's potential exposure to liability, should the Appellant commit further violations; and the "vulnerable" status of the complainants.

10. The Appellant did not directly supervise the complainants, but he was a supervisor in fact, having been classified as such and having been compensated for a supervisor position. The complainants did not report to him, but he was correctly regarded by the complainants as a person who possessed more power within the organization than they did. They also recognized that others thought well of the Appellant's work achievements. It was reasonable for them to

believe, as they did, that he could influence their employment within the Corps formally or informally, and that if they rejected his advances and invitations, their employment status might be at risk. The fact that some of his behaviors took place off-site from the workplace or during non-work hours would not change the nature of his interactions with employees. Because he was a supervisor, the Appellant's harassment of the complainants not only violated the Department and City policies, but also exposed the Department to potential liability for his actions.

11. The Appellant denied that he had violated workplace harassment policies and denied the conduct complained of by Ms Chappelle and Ms. Rhodes. He had similarly denied his conduct in 2006, essentially stating that it was the Department's mistake and taking no responsibility for what had led to the 2006 discipline. The Department could reasonably conclude from this behavior that the Appellant was at risk, regardless of discipline and training, to violate workplace harassment policies again in the future, which could harm other employees and expose the City to liability. In light of his conduct, his supervisor status, and his previous history, the Department's decision to terminate was reasonably related to seriousness of his conduct and his previous history.

12. The outcome here is regrettable, since the Appellant has contributed much as an employee, and has had to overcome significant personal hardships himself. But the Department was acting within its discretion, and has shown by a preponderance of the evidence that it had justifiable cause to terminate him. Therefore, its decision should be affirmed.

Decision

The Superintendent's decision to terminate John Jones is hereby affirmed.

Entered this 21st day of December, 2012.

Anne Watanabe
Deputy Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

CSC Rule 6.02 provides that: "Any party may file a petition for review with the Commission of all or any part of the Presiding Officer's final decision. The petition must be filed at the Commission's office, and served on all other parties, no later than ten (10) days following the date of the issuance of the Presiding Officer's final decision. The party seeking review must file an original and four copies of the petition and any related briefs submitted."