

BEFORE THE CITY OF SEATTLE CIVIL SERVICE COMMISSION (CSC)

**JOHN FOWLER,
Appellant**

V.

**FINANCE AND ADMINISTRATIVE SERVICES,
CITY OF SEATTLE, Respondent**

**MEMORANDUM DECISION AND ORDER
ON PETITIONS FOR REVIEW**

CSC No. 15-01-013

I. Introduction

This matter is before the Civil Service Commission on a Petition for Review submitted by both the Appellant John Fowler and the Respondent Finance and Administrative Services Department ("FAS") seeking review of the Hearing Officer's decision ("Decision"). FAS Director Fred Podesta originally imposed a one week suspension on Mr. Fowler for violating FAS Workplace Expectations on Mutual Respect and Confidentiality. The Hearing Officer reduced the one-week suspension to a written reprimand. Both parties timely appealed the Hearing Officer Decision to this Commission. The Commission has jurisdiction to hear the appeal.

For the reasons stated below, the Commission REVERSES in part and AFFIRMS in part the decision of the Hearing Officer.

II. Summary of Uncontested Facts

John Fowler is a Security Manager with FAS. In this position, he oversees the access systems for City buildings, monitors security at City events, and manages security detail for City elected officials. This work involves handling confidential information and making presentations on security issues to other City employees.

As Security Manager, Mr. Fowler receives incident reports and determines whether or not to request a video clip or "CD" of an incident that has been recorded by the central taping system in City Hall. Mr. Fowler requested a CD of a man masturbating in the lobby of City Hall after learning of the November 12, 2004 incident. He confirmed the accuracy of the incident report and the determination of a security professional that the man was masturbating while caught on camera.

A. The Complaint and Investigation

On January 9, 2015, Ms. Althea Cudaback filed a complaint against Mr. Fowler, alleging that Fowler had offered to show her the security CD related to the November 12, 2004 incident. Meghan Frazier, Labor Relations Manager at FAS, assigned Cameron Miller, Senior Personnel Specialist, to investigate the complaint.

Chris Potter, FAS Director of Facility Operations, supervises Mr. Fowler. Mr. Potter participated in the investigation and provided some relevant information to Ms. Miller. After eight formal employee interviews, including one of John Fowler and three of Althea Cudaback, Ms. Miller issued a final investigation report on March 16, 2015. Chris Potter, as Mr. Fowler's supervisor, recommended a disciplinary sanction of a two week suspension. This suspension recommendation was based on a finding of a violation of FAS workplace expectations. First, the FAS investigation concluded that by sharing material some employees may consider demeaning, Mr. Fowler violated the requirement that employees exercise mutual respect for their co-workers and foster a positive, productive and safe work environment. Second, the FAS investigation concluded that by offering to show a confidential security CD to a person who had no legitimate business reason to view the material, Mr. Fowler violated the requirement that employees exercise confidentiality in their work.

Following a Loudermill hearing, Mr. Potter's recommendation was reduced to a one-week suspension by the appointing authority, FAS Director Fred Podesta.

B. Procedural History

The Commission may delegate the authority to conduct an appeal to a hearing officer. *Seattle City Charter, Article XVI, Sec. 6*; SMC 4.04.250.L.7; CSC Rule 5.08. The Commission delegated the hearing in this matter to CSC Hearing Officer Donna Lurie. The Hearing Officer conducted a hearing over two days and heard witness testimony from thirteen witnesses. On January 8, 2016, the Hearing Officer issued a final decision.

The Hearing Officer's Decision concluded that Personnel Rule 1.3.2.D "contains five separate elements that must be fully satisfied in order for a suspension, demotion, or discharge to be supported by justifiable cause."

The Hearing Officer determined that "Mr. Fowler's conduct under the Mutual Respect provisions of the FAS Workplace Expectations is mitigated by the conduct of Althea Cudaback and the enmity between the two." Decision, page 19, lines 28-30. Thus, the Hearing Officer did not find a violation of that section of the FAS Workplace Expectations.

The Hearing Officer further concluded that FAS did not conduct a fair and objective investigation of the complaint in this matter. She based this conclusion on three general findings: (1) that Mr. Potter made a premature judgment of misconduct before a full

investigation; (2) that Mr. Potter was inappropriately involved in the investigation and essentially acted as “inquisitor, prosecutor, judge, jury and disciplinarian for the incident”; and (3) a lack of questioning during the investigation about the working relationship between Cudaback and Fowler.

Because of her conclusion that the investigation was not fair and objective, the hearing officer determined that justifiable cause for discipline did not exist. Even so, she did impose a written reprimand based on the “stated admissions of the appellant during the hearing.” See Decision, page 28, lines 23-24. This written reprimand was based only on a violation of the FAS Workplace Expectation that employees must exercise confidentiality in their work.

On January 19, 2016, both parties timely filed a Petition for Review of the Hearing Officer decision.

III. The Burden of Proof and the Standard on Review

The burden of proof on the employer is the same whether the Commission conducts the fact-finding hearing itself or delegates that hearing to a hearing officer. The employer must prove by a preponderance of the evidence that its disciplinary decision was for justifiable cause. *Seattle City Charter, Article XVI, Sec. 7 and Commission Rule 5.31.A.*

When the Commission has delegated the hearing, the Commission reviews the hearing officer’s decision under an appellate review standard. The Commission reviews questions of law in the decision *de novo* and reviews factual findings for substantial evidence in the record. *Commission Rule 6.08.* The Commission therefore reverses or modifies a decision of a hearing officer if it contains errors of law or is not supported by substantial evidence, or it fails to do substantial justice. *Id.*

IV. Summary of Issues on Review

Although FAS’s Petition for Review assigns error to multiple conclusions of law and findings of fact in the Decision, its brief focuses on four alleged errors in the decision.

- (1) The Hearing Officer erroneously concluded that all five factors of the justifiable cause standard must be “fully satisfied” to uphold a suspension;
- (2) The Hearing Officer found that Fowler offered to show a video of the masturbation incident to the complainant, but incorrectly concluded that Fowler did not violate the Mutual Respect provision of the FAS Workplace Expectations;
- (3) The Hearing Officer misstated and misapplied the justifiable cause factor that requires a fair and objective investigation;

- (4) The Hearing Officer erroneously concluded that a manager's participation in an investigation into misconduct renders the investigation unfair and biased; and
- (5) The Hearing Officer was wrong to conclude that a one-week suspension was not reasonably related to Fowler's violating the FAS Workplace Expectations.

Fowler's Petition for Review assigns error to two main conclusions of the Hearing Officer.

- (1) Once there is a finding that FAS did not have justifiable cause to suspend Mr. Fowler because of a biased and unfair investigation, it was improper to simply impose a different type of discipline; and
- (2) Fowler is a prevailing party following the determination that FAS must repay Mr. Fowler's lost wages because it did not have justifiable cause to suspend him, and therefore he is entitled to an award of attorney's fees.

V. Analysis

Multiple holdings in the Decision flow from the Hearing Officer's conclusion that FAS did not conduct a fair and objective investigation. Because that conclusion affects the resolution of many other assignments of error, the Commission begins its analysis on that issue. Because resolution of that question involves mixed issues of fact and law, the Commission reviews factual findings under the substantial evidence standard and reviews legal conclusions de novo.

A. Was the FAS investigation of Ms. Cudaback's complaint fair and objective?

The Hearing Officer's conclusion that the FAS investigation was unfair and biased focused on the involvement of Chris Potter, Mr. Fowler's supervisor, in the conduct of the investigation and a lack of questioning directed at Althea Cudaback.

First, the Hearing Officer determined that Mr. Potter made a premature judgment of misconduct before a complete investigation. Second, the Hearing Officer concluded that Mr. Potter inappropriately participated in witness interviews by leading the questioning of witnesses. Third, the Hearing Officer found that Mr. Potter "essentially acted as inquisitor, prosecutor, judge, jury, and disciplinarian for the incident." Decision, page 25, lines 28-29. Finally, the Hearing Officer concluded that "[n]o questions were asked about the working relationship between Fowler and Cudaback in order to uncover any possible motive." Decision, page 25, lines 9-10

1. Did Mr. Potter make a premature judgment of misconduct?

The Decision states that "it was clear to the Hearing Officer that Potter highly disapproved of Fowler's request for the security CD and felt that Fowler was motivated by

'prurient interest.'" Decision, page 24, lines 16-18. Further, the Decision states that Cameron Miller testified that Potter made a judgment that no one had a business need to view the particular CD, even John Fowler. *Id.* lines 20-22.

Potter testified that there was no reason for him or Jason Phillips to view the content of the CD because the incident report with an attached still photo provided all of the relevant information necessary for future enforcement of the rules of conduct that apply in City Hall. Potter 10/28; # 1 at 2:33:50; Potter Deposition at page 49. Evidence in the record supports a conclusion that Mr. Potter believed that either an offer to show the CD to a person with no business need, or viewing the CD with no business need "smacked of prurient interest" because of the explicit content. Phillips, 10/28 # 3 at 54:40; Potter, 10.28; #1 at 2:34:00; Potter Deposition at page 49. That is a reasonable assertion, particularly when an offer to view the CD might rise to the level of a violation of the FAS Workplace Expectations. Potter's testimony does not support a conclusion that Potter felt it was inappropriate for Fowler to request the CD in the first place. See Decision, page 24, lines 21-23. Therefore, the Commission concludes that substantial evidence does not support a finding that Mr. Potter made a premature judgment of misconduct.

2. Did Mr. Potter inappropriately participate in the investigation?

The Hearing Officer concluded that Potter's involvement in the investigation by selecting persons to interview and offering information reflected a biased and unfair investigation. The Decision states that "Potter insisted that Jason Phillips be interviewed for the sole purpose of seeing who had been offered an opportunity to view the security CD." Decision page 26, line 14-15. The Decision further states that "Potter convinced Miller that because Fowler offered the security CD to Potter and Jason Phillips he violated the expectation of restricting security videos to those with a legitimate business need." Decision page 26, line 4-6.

Potter did suggest that Miller interview Phillips for the purpose of determining how widespread knowledge of the incident was within FAS. Miller; 10/28 #2; 1:27:30. Potter and Miller jointly agreed that he should be interviewed. *Id.* at 1:28:10. And Potter did inform Miller that there was no business need for either himself or Jason Phillips to view the content of the relevant CD. *Id.* at 1:26:00. Frazer testified that she accepted Potter's judgment as to what is appropriate and a business necessity within his workgroup related to the viewing of the relevant security CD. Frazer; 10/29 #1 at 54:00. The final investigative report did not include the fact that Potter and Phillips regularly receive incident reports and have at least an opportunity to view security CDs simply because Miller didn't deem the information to be relevant. Miller, 10/28 #2, 1:11:55.

The Hearing Officer found that Potter offered “key information and inferences to the investigator; thereby participating as a key witness.” Decision at 21-22. Further, the decision cites the testimony of Frazer and McClellan as support for the assertion that “it would not be appropriate for a manager to serve as a co-investigator if the manager was a ‘key witness’ or was biased about the incident in question.” Decision, page 26, lines 22-25. That is correct, however, neither Frazer nor McClellan testified that they considered Potter a key witness or to have provided key witness information. Frazer 10/29 #1; 1:04:04. McClellan testified that it would not be appropriate for a manager to participate in a witness interview when a manager is a respondent to a complaint, or if the manager was involved with complaints against individuals with direct authority over their position. McClellan, 10/29 #1; 1:46:55.

It is, however, common within FAS for managers to participate in interviews. McClellan; 10/29 #1; 1:44:50. It is often important for a manager to participate in these interviews to understand what is occurring in their work group and facilitate their management. *Id.* at 1:46:00. When it is an investigation where they may be responsible for making a disciplinary recommendation, it is important for them to participate, and a part of their job responsibilities. *Id.* at 1:47:40.

Therefore, the Commission finds that substantial evidence does not support a conclusion that Mr. Potter inappropriately participated in the investigation.

3. Did Mr. Potter act as inquisitor, prosecutor, judge, jury, and disciplinarian for the incident?

As discussed in Section V.A.1, the record does not support a finding that Potter prejudged Fowler’s actions in this matter. As discussed in Section V.A.2, the involvement of managers at FAS in disciplinary investigations is common, and an expected part of their job responsibilities. In general, and under the facts in this case, the Commission does not conclude that the involvement of a supervisor in a disciplinary investigation supports a finding of a biased investigation.

Potter’s responsibilities include imposing or recommending discipline. Personnel Rule 1.3.2.A and B. Moreover, Potter can only recommend a suspension. *Id.* 1.3.2.B. The Department Director as appointing authority is the only individual with authority to impose a suspension. Here, Potter originally recommended a two-week suspension that Podesta reduced to a one-week suspension. Exhibit 17. This decision was subjected to another level of review and upheld by the larger Department of Human Resources. Exhibit 21. The Commission finds that it is an error of law to conclude that Potter acted as inquisitor, prosecutor, judge, jury, and disciplinarian.

4. Did the lack of a more extensive inquiry into the working relationship between Fowler and Cudaback result in an unfair and biased investigation?

The Hearing Officer assigns error to the fact that “[n]o questions were asked about the working relationship between Fowler and Cudaback in order to uncover any possible motive.” Decision, page 25, lines 9-10. The Hearing Officer then finds that more extensive questioning would have made it “clear that there was shared responsibility for the masturbation incident being discussed.” *Id.* at lines 23-24. Presumably, this conclusion of shared responsibility is that there is a strained relationship between Fowler and Cudaback that excuses Fowler’s offer to view sexual content on a security CD.

In light of the legal landscape, it is understandable that an investigator would be cautious in assigning blame to a potential victim of sexual harassment. Sexual harassment may still exist, even if the complainant also participated in some of the inappropriate conduct. *Kahn v. Salerno*, 90 Wn. App. 110, 119-21, 951 P.2d 321 (1998).

Cudaback testified that, because of her management of events at City Hall, there are times that security information is relevant to her work. 10/28 #2, 16:30. In her role, she is in periodic contact with FAS Security to exchange information about what security related activity may be occurring on a given day. *Id.* at 17:10. It would be reasonable for her to make a casual inquiry about a recent event in City Hall. The fact that the investigators did not delve more deeply into the working relationship between Fowler and Cudaback does not provide substantial evidence to support a conclusion that the investigation was biased.

5. The record does not provide substantial evidence of an unfair and biased investigation.

In sum, the Hearing Officer erred by concluding that there was not a fair and objective investigation of Ms. Cudaback’s complaint. The record does not include substantial evidence that Mr. Potter prejudged the facts, or inappropriately participated in the investigation. The system includes multiple checks and balances of Potter’s recommendations. Finally, the investigation properly focused on the relevant facts, while avoiding an improper focus on the alleged victim.

B. Ms. Cudaback’s conduct and her strained relationship with Mr. Fowler does not mitigate his conduct under the Mutual Respect provisions of the FAS Workplace Expectations.

The Hearing Officer concluded that Fowler “reasonably should have known that any jest or joking about showing a video purporting to show a man engaged in masturbation could constitute offensive behavior and could result in discipline.” Decision, page 19, lines 12-14. This

conclusion appears in the section of the decision examining whether Fowler was informed or reasonably should have known the consequences of his conduct. Yet, in the same section, the Hearing Officer continues to conclude that Mr. Fowler's violation of the FAS Workplace Expectation regarding Mutual Respect is mitigated by the conduct of Cudaback and the enmity between the two.

First, as discussed in Section V.A.4, Cudaback has a valid business reason to be apprised about security incidents in City Hall. Second, even assuming that there is a strained relationship between Fowler and Cudaback, that fact does not provide substantial evidence that supports "mitigating" a violation of the Mutual Respect provisions. A passing inquiry with a valid business purpose does not justify an offer to view content of a sexual nature on a security CD.

The Hearing Officer's conclusion is also based on speculation regarding the thought process of Fowler. Apparently without any evidentiary basis, the Hearing Officer opines that "Fowler allowed himself to become exasperated" by the simple inquiry. Decision, lines 4-5, page 20. Further the Decision goes on to conclude that Cudaback's inquiry put Fowler in a "precarious position." Finally, the Hearing Officer then points to Cudaback's actual complaint as further evidence of animosity towards Fowler.

The Commission concludes that there is not substantial evidence to support this line of reasoning, as it is primarily based on speculation. Moreover, the Commission does not find that Cudaback's inquiry or her relationship with Fowler provide any legal justification or excuse for offering to show her a security CD with sexual content. Most importantly, the Commission is concerned that the actual act of making a complaint was used as evidence to mitigate a violation of the FAS Workplace Expectations. City policy and an application of civil service principles should function to encourage complainants to come forward and report potentially harassing behavior. In sum, there is not substantial evidence to support a finding, and it is an error of law to conclude that Cudaback's behavior excuses a violation of the FAS Workplace Expectation on Mutual Respect.

C. A one-week suspension was reasonably related to Fowler's violating the FAS Workplace Expectations.

The Hearing Officer concluded that due to the "flawed and biased investigation and the shared responsibility of Cudaback for the conversation regarding masturbation," the one-week suspension was not reasonably related to the seriousness of Fowler's conduct.

As discussed, the Commission concludes that there is not substantial evidence to support a finding that the investigation of the complaint in this matter was unfair and biased. Further, the Commission concludes that there is not substantial evidence or a legal basis to justify mitigating Fowler's violation of the FAS Workplace Expectations regarding Mutual

Respect. Thus, to the extent that the Hearing Officer relied upon her conclusions on those issues to find that a one-week suspension was not reasonably related to violation of FAS Workplace Expectations, that finding is not supported by substantial evidence and is an error of law.

Moreover, the Commission concludes that a one-week suspension was reasonably related to Fowler's conduct in this matter. In 2013, Fowler received a reprimand for making a sexually crude remark to a co-worker. Decision, Finding #34. That reprimand was based on a violation of the FAS Workplace Expectations. *Id.* The next step in the disciplinary process after a written reprimand is generally a suspension. Personnel Rule 1.3.2.

D. The Commission's application of the just cause factors

Based on the foregoing, it is unnecessary for the Commission to reach the disputed issue regarding the application of the just cause factors in a civil service appeal. Regardless, in the interest of providing guidance to City departments and Hearing Officers, the Commission provides the following interpretation of the City Charter and Personnel Rules.

The City Charter states that "[n]o member of the civil service may be suspended or dismissed from employment except for justifiable cause." Article XVI, Section 7.

The City of Seattle Personnel Rules, which serve to interpret and apply the City Charter, further elaborate on the just cause standard in Section 1.3.2.D:

A regular employee may be suspended, demoted or discharged only for justifiable cause. This standard requires that:

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.

The Hearing Officer concluded that the just cause factors listed in PR 1.3.2(D) “must be fully satisfied in order for a suspension, demotion or discharge to be supported by justifiable cause.” See Decision, Part III, page 18. See also *Id.* at III.5 (concluding that CSC Rule 5.31 “requires the employer to prove its case for all five elements [of PR 1.3.2(D)] by a preponderance of the evidence”).

The Commission respectfully disagrees with the Hearing Officer’s legal conclusion that PR 1.3.2.D inserts mandatory elements that must each be fully satisfied by a preponderance of the evidence standard in every case in order to meet a “just cause” standard. Instead, the Commission interprets PR 1.3.2.D to provide factors for consideration in determining whether the “justifiable cause” standard, as articulated in the City Charter, is met in a particular case.

Considering factors for a determination of just cause is consistent with the application and review of the just cause standard by the City of Seattle Public Safety Civil Service Commission. See *Mahoney v. City of Seattle*, No. 09-001, at 2 (Public Safety Civil Service Commission, Aug. 26, 2009), available at http://www.seattle.gov/Documents/Departments/PSCSC/Findings/09-001_Mahoney_AFFCLO_PSCSC_08-26-09.pdf. “As the [Public Safety Civil Service] Commission has repeatedly said in prior decisions, the factors are just that—factors it considers in its analysis.” *Id.* The PSCSC application of the just cause standard was upheld in *City of Seattle v. City of Seattle*, 155 Wn. App. 878, 230 P.3d 640 (2010). In that case, the court considered a state statute that required that discipline be imposed only “in good faith for cause.” *Id.* at 886.

A City of Seattle ordinance applicable to PSCSC employees largely paralleled the state statute and required the PSCSC to review disciplinary decisions to determine whether discipline was imposed “in good faith for cause.” *Id.* at 886-887. The court concluded that, in the absence of a further legislative definition, the PSCSC had discretion under its enabling legislation to apply a reasonable just cause standard, and the PSCSC’s articulated test was reasonable. *Accord Civil Serv. Comm’n of City of Kelso v. City of Kelso*, 137 Wn. 2d 166, 969 P.2d 474, 478 (1999) (explaining that a determination of just cause involves factors for consideration).

VI. Conclusion

The Hearing Officer’s conclusion that Fowler did not violate the Mutual Respect provision of the FAS Workplace Expectation is not supported by substantial evidence.

The Hearing Officer’s conclusion that a manager’s participation in an investigation into misconduct renders the investigation unfair and biased is an error of law.

The Hearing Officer’s conclusion that Chris Potter inappropriately participated in the particular investigation is not supported by substantial evidence.

The Hearing Officer's conclusion that the investigation of the complaint in this matter was not fair and objective is not supported by substantial evidence and is an error of law.

Although unnecessary for the Commission's decision in this case, the Commission interprets the City Charter and Personnel Rules to set forth factors for consideration in a determination as to whether just cause for discipline exists.

Based on the foregoing, the Commission does not reach the issue of Mr. Fowler's claim for attorney's fees.

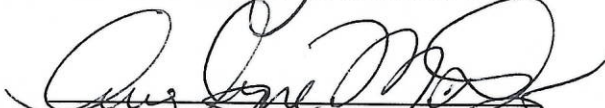
VII. Order

1. The Decision of the Hearing Officer is AFFIRMED in part and REVERSED in part.
2. The Finance and Administrative Services one-week suspension is reinstated.

Dated this 30th day of March, 2016

FOR THE PUBLIC SAFETY CIVIL SERVICE COMMISSION


Steven A. Jewell, Commission Chair


Angelique M. Davis, Commissioner


Eric de los Santos, Commissioner

Note: A decision of the Commission shall be final and conclusive unless a party of record makes a timely application to the Superior Court of the State of Washington for King County for a Writ of Review.