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IGOR MIHIC

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FINDINGS OF FACT

Appellant's Background

1. Appellant Igor Mihic is a refugee from Bosnia, Herzegovina. Appellant and his family moved to the United States in 1998. Appellant speaks Serbian, Croatian, German and English, with his primary language being Serb-Croatian.
2. Prior to working for the Metropolitan Health Department, Appellant worked for Catholic Charities and Metro Social Services as a Social Worker. Appellant began working in the WIC program for the Metropolitan Health Department (Department) ten (10) years ago. Appellant currently works at the South Nutrition Center, which opened on October 17, 2011.
3. Appellant has a strong Russian accent and speaks English as a third language. Being a non-native speaker of English affects the manner and style of Appellant's speaking; this fact provides a partial explanation for the events of May 16, 2011.

Woodbine Clinic

4. Immediately prior to taking the position at the South Nutrition Center, Appellant worked at the Lentz Clinic, which is also part of the Department. Prior to working at Lentz, Appellant worked at the Department's Woodbine Clinic. Appellant was employed at the Woodbine Clinic when the incident in question occurred.
5. Appellant was the only clerk in the Woodbine clinic's WIC pick-up center and was required to service approximately 1500 people monthly. The Woodbine Clinic requires

its clerks to work more than all the other clinic clerks. Other clerks resist going to work at Woodbine because of the amount of work required. For example, in January 2011, Appellant serviced 1,766 patients. For that same month, the next highest number of patients served by a clerk was 847. Other clerks served 500, 83, and 78 patients respectively during that same month.

6. Appellant was the only male clerk.
7. Appellant sustained a work related injury, i.e. tennis elbow and carpal tunnel syndrome, on January 3, 2011, from excessive typing. Appellant sought medical treatment for his injuries and was given restrictions which limited the amount of typing he could provide safely. Injured Appellant needed assistance from another clerk in completing his job because of the high number of patients seen at Woodbine. Injured Appellant requested assistance from Ms. Karen Bess, his supervisor, but was repeatedly told help was unavailable.
8. Appellant felt that Ms. Bess was rude and insulting towards him when he presented her his Injury On Duty (IOD) form. Ms. Bess did not comply with Appellant's medical restrictions. When Appellant complained regarding Ms. Bess's refusal to honor his work restrictions, Director of Nursing Becky Green accused the Appellant of being disrespectful and insubordinate, based on Appellant's desire to pick and choose his assignments.
9. Appellant contacted Leslie Robeson in Human Resources regarding his restrictions. Ms. Robeson moved Appellant to another work site that had significantly less typing, however, Appellant remained at the Woodbine clinic.

10. There was an incident in which Ms. Bess instructed Appellant to give another employee his computer password. Appellant was reluctant because he believed it was in violation of the Metro internet policy. Appellant eventually did give his password to the employee.
11. Appellant made a complaint to John Dunn because he continued to receive bills for his injury and he believed the forms were not filled out correctly by Ms. Bess. In his complaint, Appellant also addressed the incident where he was required to give another employee his password. After communicating with Mr. Dunn, Appellant was immediately sent a memo instructing him to stay at home until he was sufficiently recovered and able to work.
12. In late February or early March 2011, Ms. Robeson and Woodbine Charge Nurse Carline Fanfan arranged it so that Appellant would no longer report to Karen Bess but only to Charge Nurse Fanfan, Ms. Bess' supervisor.
13. Appellant was out of work for about three (3) weeks to rest his arm. Upon returning from his time off, due to injury, Appellant was given an *extra*¹ performance evaluation in which he was rated very poorly.
14. Appellant was evaluated for the time period of March 17, 2011 through May 13, 2011 (eight weeks) by Charge Nurse Fanfan and received an unacceptable rating. During this eight (8) week period, Appellant was off four (4) of the weeks due to injury. The span of time included the time that the Appellant was rotating to various desks or stations within the Woodbine Clinic, not just the time printing vouchers in the pick-up center. During the rotation, the Appellant made numerous mistakes in working in non-pick-up areas. Appellant declined offered refresher training, prior to working in the non-pick-up areas.

¹ Performance evaluations were generally given one time per year and Appellant had already received his evaluation for the current year.

15. Appellant's performance evaluations from 2006-2010, most of which were completed by Karen Bess and Carlen Fanfan, all showed acceptable performance.

Incident

16. On May 16, 2011, Charge Nurse Fanfan called the Appellant into her office to give him a written reprimand, a Performance Improvement Plan (PIP), and an evaluation for his recent work at the Woodbine Clinic. It is undisputed that both Ms. Bess and the Appellant raised their voices during the May 16th meeting.

17. Charge Nurse Fanfan's office is very small, approximately six (6) by six (6) feet. Charge Nurse Fanfan, the Appellant, Ms. Bess, and Nurse Anne Fontaine were within reaching distance of each other. Ms. Bess was only in the meeting as general supervisor of the clerks.

18. During the meeting, Appellant attempted to phone Human Resources to discuss the performance improvement plan and the evaluation, which he considered unfair and unwarranted. Charge Nurse Fanfan took a phone call and turned toward her desk, so that her back was to Ms. Bess and Appellant was to her side. In order to hear her (Fanfan's) telephone conversation, Charge Nurse Fanfan tapped Ms. Bess on the leg in an effort to quiet Ms. Bess. Ms. Bess talked over Appellant during the meeting and stated to him "you think you are special."

19. While Charge Nurse Fanfan was still on the phone, it is alleged that the Appellant sat on the edge of his seat, pointed his finger at Ms. Bess, and said, "This is all your fault. I will get you." Appellant vigorously denies that he said "I will get you." Rather, the Appellant contends that he scooted to the edge of his seat and counted on his hands when

speaking to Ms. Bess, saying: 1) I will get union; 2) I will complain to Leslie; 3) I will complain to Dr. Paul.

20. Appellant vigorously contends that he said “I will get Union,” not “I will get you.”

21. It is **DETERMINED** that Appellant Mihic’s verbalization of “I will get you” v. “I will get Union” is virtually indistinguishable, due to Appellant’s heavy accent.

22. It is **DETERMINED** that Appellant said, “I will get Union,” not “I will get you.”

23. It is also **DETERMINED** that it is reasonable that Appellant’s conduct of scooting to the edge of his seat and counting/gesturing with his fingers, in a small room, with three (3) women and one (1) man, constitutes intimidating behavior.

24. Charge Nurse Fanfan testified that both the Appellant and Ms. Bess were talking in raised voices during the May 16th meeting. Charge Nurse Fanfan further testified the relationship between Ms. Bess and Appellant was argumentative. In fact, Charge Nurse Fanfan had given Ms. Bess at least one verbal warning due to her interaction with the Appellant.

25. Ms. Bess testified that she felt fearful and threatened by Appellant’s movement to the edge of his seat and the look in his eye. Ms. Bess described the Appellant’s tone as “rigid, hostile, and vicious.”

26. After the meeting ended, Ms. Bess told Charge Nurse Fanfan what she believed the Appellant to have said. At that point, Charge Nurse Fanfan also interpreted the Appellant’s actions as intimidating or threatening toward Ms. Bess.

27. Nurse Anne Fontaine had been invited to the May 16th meeting as a “neutral.” Nurse Fontaine interpreted the Appellant’s actions as intimidating or threatening toward Ms. Bess and testified that she heard the Appellant state, “I will get you.” Nurse Fontaine

admits that she does not work around the Appellant often. By not working around the Appellant often, it is **DETERMINED** to have been more difficult for Nurse Fontaine to have negotiated the Appellant's heavy accent accurately.

After the Incident

28. After the May 16th meeting, Appellant continued working until his regular stopping time of 4:00 p.m. On May 17th, the next day, Ms. Bess reported to work but did not leave her office. Ms. Bess did send the Appellant a work-related e-mail on May 17th.
29. Appellant believes Ms. Bess was retaliating against him because of the numerous complaints he made against her. Karen Bess was rude to Appellant on multiple occasions and had previous disagreements with him.
30. Charge Nurse Fanfan had a good relationship with Appellant.
31. Appellant contends that he was placed in an unfair situation when Ms. Bess was allowed to attend the meeting. Ms. Bess had been removed from direct supervision of Appellant. By having Ms. Bess and two additional individuals in a small meeting room, opposing Appellant, the scene was ideal for confrontation. In hindsight, perhaps the May 16th meeting would have flowed without incident if Ms. Bess had not been present, given the history between Ms. Bess and the Appellant. On the other hand, it is certainly management's right to determine who is to be present at a given meeting.

The Investigation

32. The Metropolitan Health Department investigated Ms. Bess' complaint by interviewing the Appellant's coworkers. The Department felt it needed to determine whether or not it was providing a safe workplace for its Woodbine Clinic employees.
33. Leslie Robeson, from Human Resources, came to the Woodbine Clinic and asked Ms. Irene Rodriguez if she had ever felt threatened by Appellant or seen him threaten someone else. Rather than speaking against the Appellant, Coworker Rodriguez testified that she had witnessed Ms. Bess roll her eyes and sigh in a frustrated manner when Appellant spoke in meetings. Ms. Rodriguez testified that the supervisors asked her and other employees to write down negative things about Appellant, stating "I can't tell you why but I wish that you would write this stuff down and turn it in." Ms. Rodriguez testified it felt like a "set-up" to her and seemed very unfair.
34. Ms. Rodriguez indicated that she had voiced concern to Ms. Bess and Charge Nurse Fanfan that the amount of work at the Woodbine Clinic pick-up center was too much for one (1) clerk. Shortly thereafter, the Appellant suffered his injury.
35. Ms. Luci Ferguson, a Nutritionist Educator, worked with Appellant at Woodbine Clinic and now works with him at South Nutrition Center. Ms. Ferguson testified that the Appellant is always friendly and nice to the participants and everyone leaves happy; "he is very good." Ms. Ferguson has witnessed clients/participants being very rude and even violent with the Appellant, but the Appellant never responded to their anger and always remained calm, even when one (1) client busted down a door.
36. The Appellant was well-liked by his coworkers and was often a source of assistance for them.

37. According to Ms. Ferguson, Ms. Bess was “short” with Appellant but not with other employees. When Ms. Robeson asked Ms. Ferguson to write down whether she ever felt threatened by Appellant, she (Ferguson) was shocked and answered “No.”.
38. Nadia Acosta, an interpreter at the South Nutrition Center, moved from Woodbine Clinic because of its stressful environment. Ms. Acosta has known the Appellant for ten (10) years and was shocked to hear the allegations against him.
39. Ms. Acosta has witnessed Ms. Bess being rude to participants and described her as intimidating. Ms. Bess was always more flexible with the other clerks, in Ms. Acosta’s opinion, and would raise her voice at Appellant during meetings.
40. Ms. Acosta does not think Ms. Bess likes the Appellant, testifying she was harder on him than other workers and gave him little consideration when he told her he needed a break because of his injury.
41. Ms. Acosta also testified that the Appellant requested assistance printing vouchers prior to his significant injury but Ms. Bess would reply to the effect of “come on Igor, you are complaining again.” According to Ms. Acosta, Ms. Bess could have given assistance to Appellant and prevented his injury.
42. Through the investigation, the Appellant was shown to be an honest, hardworking employee with no reputation for being aggressive, violent or intimidating. Appellant was considered to be a competent and respectful employee, by his coworkers. Appellant had *never* been seen losing his temper with a client, co-worker or supervisor.
43. Coworkers who knew the Appellant well were shocked to hear he was accused of intimidating Ms. Bess because it was out of character for the Appellant. Coworkers

admitted that the Appellant asked a lot of questions for clarification, but did not consider him argumentative. Coworkers said that they had never heard him raise his voice.

44. The bottom-line of the investigation is that Appellant exhibited no intimidating or violent pattern of behavior.

Internal Disciplinary Hearing

45. Dr. William Paul, MD, Director of the Metro Public Health Department, conducted the disciplinary hearing regarding Appellant's alleged statements and conduct on May 16th.

46. Oddly, Ms. Bess did not appear at the internal disciplinary hearing to testify against the Appellant. In a conversation with Dr. Paul after the disciplinary hearing, Ms. Bess described the Appellant as leaning forward in his chair, pointing his finger at her (Ms. Bess), and saying "This is all your fault. I'm going to get you for this."

47. Appellant testified in the internal hearing that he said "I'm going to get union." Appellant contends that he did not say "I'm going to get you." Dr. Paul testified that he believed it was possible Appellant said "I will get union."

48. However, Dr. Paul also testified that the statement "I will get union" could be interpreted as a threat. Dr. Paul determined that Appellant had not issued a threat, but felt that his actions were an attempt to intimidate.

49. Initially, the Appellant denied pointing his finger at Ms. Bess during the meeting. Later in the hearing, the Appellant admitted that he was counting on his hand and recognized that it may have appeared he was pointing his finger.

50. Charge Nurse Fanfan and Ms. Fontaine presented similar stories about the Appellant's body language and the message that the Appellant conveyed through it.
51. At both the departmental hearing and at the instant contested case hearing, Ms. Fontaine testified that the Appellant leaned forward in his chair, pointed his finger at Ms. Bess, and said, "This is all your fault. I'm going to get you for this."
52. Although Charge Nurse Fanfan was on the phone and did not hear what the Appellant said, Charge Nurse Fanfan agreed with Ms. Fontaine about the Appellant having scooted to the edge of his seat and having pointed his finger at Ms. Bess.
53. Charge Nurse Fanfan did not hear the exchange between Appellant and Ms. Bess because she was on the phone but did not feel threatened or perceive there was any type of threat issued. Nurse Fontaine did not interpret what Appellant said as a threat. Likewise, Dr. Paul did not find Appellant issued a threat. Rather, Charge Nurse Fanfan, Nurse Fontaine, and Dr. Paul all considered the Appellant's conduct to constitute intimidation.
54. Appellant is represented by SEIU Local 205, a union, and it is his legal right to contact them when he perceives he is being treated unfairly at work; this does not constitute intimidation nor is it a threat. In fact, an employee cannot be disciplined for their union affiliation under federal law.

CONCLUSIONS OF LAW

1. Chapter 6, Section 6.7(11) of the Rules of the Civil Service Commission of the Metropolitan Government of Nashville and Davidson County shows that discipline can be imposed for:

(11) Violation of any written rules, policies or procedures of the department in which the employee is employed.

2. Pursuant to the Violence in the Workplace Policy #6.5 B II,

The Metropolitan Public Health Department has a Zero Tolerance Standard with regard to threats and violent behavior in the workplace. Specifically prohibited are: threats and/or violent behavior, whether direct, indirect, or actual conduct from any person, including employees and members of the public. ... The use or threat of violence or intimidation is a grounds for disciplinary action against any MPHD employee as outlined in the Civil Service Rules and Regulations of the Metropolitan Board of Health.

3. The Appellant was charged with violating Policy 6.5 B II above, as well as Public Health Department's Civil Service Rules 6.5(b), #27 and #31. Rule 6.5(b) indicates that:

The following are grounds for disciplinary action: ...

#27 The use or threat of violence or intimidation. See Policy 6.5 B II – Violence in the Workplace. ...

#31 Conduct unbecoming an employee of Metropolitan Government.

4. Both the government and the Appellant agree that no actual violence occurred. According to Dr. Paul, Appellant did not threaten his former supervisor, Karen Bess, on May 16, 2011. The parties disagree as to whether the Appellant's conduct and words constituted intimidation.

5. By a preponderance of the evidence, it is **CONCLUDED** that Appellant Mihic stated "I will get union" during the meeting on May 16, 2011, which was incorrectly interpreted by Ms. Bess and Nurse Fontaine as "I will get you."

6. Dr. Paul believes that Appellant's statement that he would contact the union was itself intimidation and thus found Appellant guilty of intimidating Karen Bess, based on this statement. It is **CONCLUDED** that although the intent to contact the union, in and of itself, is not intimidating, to state an intent to contact the Union while leaning

- forward on one's chair and while gesturing (counting on his hands) **DOES** constitute what many reasonable people would consider intimidation. Therefore, Rules 6.5(b) 27 & 31 and Policy 6.5 B II were violated.
7. Now that it is established that the Appellant violated MPHD Rules 6.5(b) 27&31 and Policy 6.5 B II, one must consider what level of discipline, if any, is appropriate.
 8. Progressive discipline requires that discipline be instituted at the lowest level appropriate to gain future compliance.
 9. Appellant is from another culture and may not be as familiar as others with the American view of the conduct of scooting to the edge of one's seat, gesturing with one's hands, and in a loud voice declaring that one intends to exercise all avenues of recourse available. It is **CONCLUDED** that the Appellant did not intend to intimidate Ms. Bess, but his conduct and voice were reasonably perceived as intimidating, nevertheless.
 10. Given that the investigation revealed no pattern of violence or intimidation by the Appellant, surely the Appellant has learned through the disciplinary process that, in America, body language (scooting; pointing; counting on one's raised fingers) and raised tone of voice count and can be easily interpreted in a negative fashion. Surely the Appellant has learned about the importance of body language and tone of voice when communicating with management and will not employ such intimidating body language and tone of voice in the future.
 11. Based on the above, it is **CONCLUDED** that the appropriate discipline for Appellant Mihic's conduct is a **ONE (1) DAY SUSPENSION**.

12. Accordingly, Appellant Mihic is to be **RESTORED** any vacation or other leave time, pay, and/or other benefits associated with the additional two (2) days of suspension already received.

This Initial Order entered and effective this 2 day of May, 2012

Mattielyn B. Williams
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State this 2 day of May, 2012

Thomas G. Stovall, Director
Administrative Procedures Division