

Patricia L. Palafox

El Paso City Civil Service Hearing Officer

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September 9, 2024

Civil Service Commission
c/o Mary Wiggins, Civil Service Commission Secretary
By hand delivery to: Symone Menchaca
300 N. Campbell
El Paso, Texas 79901

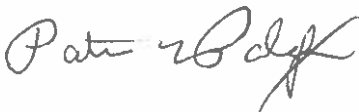
Re Civil Service Appeal Kirk Douglas CSC 24-PR-01PP

Dear Ms. Wiggins:

Enclosed are my Recommendation and Exhibits from this Appeal. The City submitted a 3 ring binder with their exhibits, and Mr. Douglas submitted two exhibits, A-1 and A-2. Please process them as usual for the Civil Service Commission. If the Commission desires my presence at the meeting during which they will consider this appeal, please let me know by e mail. It has been the usual procedure in the past few years that they have desired my presence to answer questions and clarify issues.

Neither party requested that the hearing be recorded pursuant to the written rules for doing so. Therefore, I have not recorded the hearing.

Sincerely,



Patricia L Palafox
Hearing Officer

cc: Symone Menchaca, Human Resources

BEFORE THE CIVIL SERVICE COMMISSION
FOR THE CITY OF EL PASO, TEXAS

IN RE: KIRK DOUGLAS)
)
) DOCKET NUMBER
) 24-PR-01PP
)

RECOMMENDATION OF HEARING OFFICER

A. Case Procedural Summary

DATE OF DISCIPLINE: 6-21-24 TO 7-4-24 (10 day suspension)
DATE OF ASSIGNMENT:
TO HEARING OFFICER: 7-15-24
DATE OF PREHEARING: 7-19-24
DATE OF HEARING: 8-14-24
PLACE OF HEARING: City Attorney Conference Room
ATTORNEY FOR CITY: Matthew Marquez
REPRESENTATIVE FOR THE CITY: Pablo Caballero, Dept. Director
REPRESENTATIVE FOR THE EMPLOYEE: None. Represented himself.

WITNESSES FOR THE CITY:

Pablo Caballero-Department Head, Parks and Recreation
Celeste Dani Porras- Recreation Specialist & Acting Program Manager
Monica Vargas-Recreations Program Manager
Mike Gonzales-Recreation and Sports Coordinator
Claudia Cancellare-Employee Relations Officer
Alejandra Rivera-Senior Human Resources Analyst
Tracy Chavarria-Human Resources Business Partner

WITNESSES FOR THE EMPLOYEE:

Kirk Douglas-Sports Recreation Leader
Fernando Ramirez-Sports Recreation Leader
Keith Edmond-Sport Site Employee (part time position)

EXHIBITS ENTERED AS EVIDENCE:*

**Note: City Exhibits are C- and Appellant Exhibits are A-. The City withdrew Exhibits C-9 and C-14 but the Appellant entered them as A-1 and A-2.*

City Exhibits C-1 to C-8, C-10 to C-13, C-15
Appellant's Exhibits: A-1, A-2

B. Summary of Case

Kirk Douglas received a ten day suspension based on his conduct on February 16, 2024. Mr. Douglas's job as a Sports Recreation Leader requires that he be present at City League games on Parks and Recreation property to assure that contracted score keepers and referees do their jobs, that participants conduct themselves appropriately, and that the games, whether basketball or volley ball, or other games played on El Paso Parks and Recreation property, run smoothly. A non-City employee score keeper for a basketball game, Sabrina Amor, filed a complaint with the City by e mail alleging that Douglas conducted an inappropriate conversation with her on February 16, 2024 during a basketball game where she was working as a scorekeeper.

The Notice of Suspension contends in the "Specifications" section, Exhibit C-1, p. 8), that the score keeper reported that Douglas began making conversation and began asking questions about her age and personal aspects, such as her relationship status. "She informed you that she was only 18 years old and you asked whether she would date an older guy. She reported that she responded no, but you insisted on essentially trying to minimize your age difference and that you could work things out." The Notice states that she reported that during the interaction Douglas repeatedly asked her for her social media (Instagram) information, and she told him no multiple times. Similarly, she reported that Douglas repeatedly asked for her phone number, and she had to keep saying no. She reported that overall, the situation made her feel uncomfortable because of Douglas's persistence and not taking no for an answer.

The Notice states further that during an investigation by Human Resources, Douglas acknowledged that he did have the conversation and that when the scorekeeper did not give him her Instagram information, "you stated that you made a comment to her that Instagram is a public place and questioned her as to why she would not give you her Instagram information if she does not post any 'explicit photos.' Whether your words were 'explicit photos' or 'nudes', this insistent questioning on personal matters was still offensive and inappropriate for the workplace. Your repeated and persistent actions went beyond attempting to engage in conversation or getting to know the Score Keeper in a friendly manner."

A last allegation in the Notice is that "a witness confirmed that you repeatedly stood at the

entrance of the gym where the Score Keeper was working and stared at her on more than five (5) occasions causing her to feel uncomfortable in the workplace.”

The Notice contends that Douglas violated the Sexual Harassment Prevention Policy and Procedures. “Sexual Harassment is strictly forbidden. Any behavior that constitutes inappropriate workplace behavior is prohibited, regardless of intent or severity. This policy is designed to stop this type of behavior and prevent its reoccurrence. Your actions and behavior are not in alignment with the City’s Mission, Vision or Values and will not be tolerated.” (Exhibit C-1, p. 8)).

Mr. Douglas’s disciplinary history is listed as a three day suspension beginning May 8, 2024 for Disobeying a Direct Order. (Exhibit C-1, p. 8).

C. Timeliness of Discipline Notice to Employee

The Notice of Suspension is dated June 20, 2024, and was given to Mr. Douglas on June 20, 2024 as indicated by his signature acknowledging receipt.(Exhibit C-1).

Civil Service Rule 8, Section 3(e) provides as follows:

“A proposed written notice of disciplinary action must be served on an employee within 120 calendar days from the date Human Resources is made aware of the occurrence of the incident giving rise to the discipline, provided however that this period of limitation shall be tolled if an investigation is being conducted by a law enforcement authority into criminal charges against the employee arising out of the same incident.” (Exhibit C-1, p. 3).

On page 7 of the Notice of Suspension, Exhibit C-1, the City lists, in bold, as follows:

**“Date Received by Human Resources: February 20, 2024
120th Day Deadline, pursuant to CSC Rule 8 Section 3(e): June 19, 2024”**

Civil Service Rule 8 further states in Section 3(f) as follows:

“Any issue of non-compliance with these provisions will be considered by the hearing officer and/or Commission upon the appeal of the disciplinary action.” (Exhibit C-1, p. 3).

The Notice of Suspension should have been given to Mr. Douglas on June 19, 2024 to comply with the 120 day rule. It was given to him one day too late, on June 20, 2024. Therefore, although neither the City nor the Employee Appellant brought up this issue with this Hearing Officer at any point in these proceedings, this Hearing Officer will consider the issue pursuant to Rule 8 Section 3 (f). In most courts at law, unless the timeliness of the lawsuit is brought up by

one of the parties at the beginning of the lawsuit, the issue is “waived” and will not be considered by the court. However, rules followed by the courts in a civil lawsuit do not govern the Civil Service Commission. The Civil Service Commission is governed by the powers granted to it by the El Paso City Charter. The City Charter grants the Civil Service Commission the power to “establish its own procedures within the framework of this Charter” to carry out its functions. (City Charter, Section 6.1 Civil Service Commission). Accordingly, in Rule 8, the Civil Service Commission has promulgated rules for disciplinary actions, including certain time limits. Rule 8 states that the hearing officer and/or Commission “will” consider non-compliance with the provisions of Rule 8. The rule does not say “if a party brings it up.”

The Notice of Suspension was not served on Mr. Douglas within the 120 calendar day time guidelines of Civil Service Rule 8, Section 3(e). There was no evidence of any ongoing criminal investigation by a law enforcement agency that would have extended the time deadline. There was no evidence that a Notice of Proposed Suspension was given to Mr. Douglas at some earlier date. Therefore, this disciplinary action violates the time deadlines of Civil Service Commission Rule 8 Section 3(e). The 10 day suspension should not be sustained.

RECOMMENDATION ON TIMELINESS OF DISCIPLINE

Based on the evidence provided by the City and the employee appellant for this hearing, I find that the Notice of Suspension was served on Kirk Douglas one day too late and **the discipline should not be sustained**. However, if the Commission decides to allow the disciplinary appeal to proceed regardless of the time deadline missed, what follows is my analysis of the facts and evidence upon which the discipline was based.

C. Discipline Facts and Evidence

Sabrina Amor, the complainant, is a scorekeeper. Scorekeepers and referees are provided to the City’s games through a contract the City has with Marcelino Velasquez, who is nicknamed “Che.” Velasquez provides these individuals and then submits billing to the City, which pays Mr. Velasquez who then pays the scorekeepers and referees. Scorekeepers are often students working at games to make extra money. At a game on February 16, 2024, a friend of Sabrina Amor approached Fernando Ramirez, another Recreation Leader who works with Kirk Douglas, and told him her friend wanted to make a report on a co-worker that made her uncomfortable. Ramirez told her to speak to his supervisor, who was Dani Porras, or to her supervisor, “Che” Marcelino

Velasquez.

On February 17, 2024, Sabrina Amor sent an e mail to Danni Porras, but it was the wrong e mail. Ms. Amor then forwarded it to Dani Porras the next day, Sunday February 18, 2024. (Exhibit C-7). In the e mail, Sabrina Amor outlined an incident she had on February 16, 2024 when she was performing her duties as a scorekeeper in the TP gym. Ms. Amor stated that Douglas asked her personal questions such as her age and relationship status. He asked her if she would date an older guy as he was 30 years old, and although she told him no, he “kept insisting saying that we could work things out. Then he repeatedly asked me for my Instagram after I told him no multiple times.” (Exhibit C-7, p, 2). Ms. Amor stated: “Overall this situation made me uncomfortable because he kept flirting with me and wouldn’t take no for an answer.” Ms. Porras immediately forwarded the e mail to her supervisor Mike Gonzales, who then forwarded it to his supervisor Monica Vargas. Pursuant to the City’s Sexual Harassment Prevention policy, Human Resources was notified so that they could conduct an investigation. Sexual harassment allegations received by a supervisor must be forwarded to Human Resources who will conduct an investigation immediately. (Exhibit C-2).

Dani Porras, Douglas’s immediate supervisor who initially received Amor’s e mail complaint, testified at this Hearing that she did speak to Sabrina Amor after the first game at which Sabrina Amor kept score after the e mail, and Sabrina confirmed what she had said in the e mail. However, Amor also added that when she refused to give Douglas her Instagram information, he had asked her why not share? Were there nudes on her Instagram?

Alexandra Rivera, Senior HR Analyst, investigated Sabrina Amor’s complaint. She talked to Sabrina Amor to confirm the details in her complaint. Because Amor was not a city employee, she could not force her to come into her office, so she spoke to her by phone as she would any other citizen complainant. Rivera conducted interviews, including of Mr. Douglas, who provided two question and answer written statements. (Exhibits C-10, C-11). In his written answers, and in his testimony at this Hearing, Mr. Douglas denied all the allegations made by Sabrina Amor. He did not deny that they had a conversation, but he denied that he was persistent in asking for Instagram information or telephone numbers or was inappropriate in any way. In a written statement on March 13, 2024, in response to a question as to whether he asked Sabrina personal questions such as her age and relationship status, Mr. Douglas answered: “I asked Sabrina how

did she get into scorekeeping and she mentioned she used to play basketball. We had a full in-depth conversation which led to her disclosing personal information to me.” In response to whether he asked Sabrina if she would date an older guy, he responded: “I don’t recall asking her would she date an older guy.”(Exhibit C-10).

In a statement on April 3, 2024, a question asked : “When Sabrina did not want to provide you with her Instagram username, why did you ask her if she had any nudes?” Mr. Douglas’s handwritten answer was as follows: “I did not ask her if she had any nudes, I stated to her that Instagram is a public place and I asked her why if she does not post any explicit photos.(Exhibit C-11).

Mr. Douglas does not deny that he received the City’s Sexual Harassment policy and the Disciplinary Matrix on April 25, 2023 when he was hired. (Exhibit C-4)

D. Defenses of Kirk Douglas

Mr. Douglas contends that the ten day suspension should not be sustained for the following reasons:

1. The evidence against him is not concrete enough. There were no witnesses to the conversation for which he is being suspended except for him and Sabrina Amor. It is a question of “he said, she said.”

2. His questions to her were misconstrued. For example, he never asked if she posted “nudes” but rather asked if she posted “explicit photos.”

3. Why wasn’t her supervisor Marcelino (“Che”) Velasquez called by the City to testify? His coworker Fernando Ramirez testified at the hearing to the fact that Sabrina Amor was not a good worker, was often late, was young, distracted, etc. Douglas had told her supervisor Che Velasquez about her work performance issues. Mr. Ramirez testified that he had never seen Kirk Douglas act inappropriately with Sabrina Amor or others in the eight months he had worked with Douglas. Both had the same job duties as Recreation Leader.

4. Sabrina Amor did in fact give him her Instagram user name that day in question and he sent her a video of him playing basketball.

5. Sabrina Amor never told him he was making her uncomfortable. He was not persistent with her and she did not tell him “no” repeatedly. He did not repeatedly ask for her Instagram and personal information.

6. Sabrina Amor asked him to stay by her side that night because she did not know what she was doing. Why would she do that if she were uncomfortable with him? Why did she take his mints from the table and eat one if she were so uncomfortable?

7. The Employee Handbook does not say you cannot follow someone on Instagram. Rules do not prevent outside relationships with co-workers. He received no training that he could not ask for social media accounts.

8. Allegations about prior conduct at Gary del Palacio Center is not supported by any concrete evidence, no names of the complainants, no "pattern of behavior." Relying on some rumor of past pattern of behavior "is not right."

E. Discussion of Evidence

As happens in many cases of alleged sexual harassment, the only witnesses to the incident on February 16, 2024 were the two participants, employee Kirk Douglas and the complainant Sabrina Amor. If this were a "he said, she said," case, and they were both equally believable and there was no other circumstantial or other evidence, then the City might not be able to prove its case by a "preponderance of the evidence," or more than 50 %. Sabrina Amor was not called as a witness by either the City or Mr. Douglas. While she is not a City employee who could be ordered to attend the hearing, she could have been subpoenaed by either side through the procedures available during this hearing. However, a party is not required to call all witnesses, but is only required to bring enough evidence to prove their case by a preponderance of the evidence.

Therefore, the evidence from Sabrina Amor is what she wrote in her e mailed complaint (Exhibit C-7, p. 2) and what two witnesses testified Sabrina told them when they talked to her. Alejandra Rivera, the H.R. investigator, and Dani Porras, who received the e mail complaint, both testified that they had spoken to Sabrina Amor who confirmed her written complaint and added the allegations about the nudes/explicit photos question by Mr. Douglas.

Mr. Douglas called a witness, Keith Edmond, who had seen Douglas and Amor sitting at the scorekeeper's table. Edmond testified that he only observed them for two minutes as he was busy playing in the basketball game Ms. Amor was scoring. He said Ms. Amor was laughing. He did not hear any of their conversation.

While witnesses did testify in answer to questioning about both Mr. Douglas's work performance, and Ms. Amor's work performance, neither's work performance, whether good or

bad, is relevant to the case at hand.

Dani Porras, in her written statement, made an allegation that in December 2023 and Jan 2024, some women at the Gary Del Palacio Center where volleyball is played were uncomfortable with Mr. Douglas's requests for social media information. However, the Department Director and Human Resources witnesses at this hearing clearly stated that since nothing had been reported by anyone in a timely manner, nor had it been investigated, the allegations about women in the Gary Del Palacio Center were not considered in the present case. In fact, under the Sexual Harassment policy, Ms. Porras had a duty to immediately report any knowledge of sexual harassment if it came to her attention, which she clearly did not do. Ms. Porras also forwarded to the investigator in this case an e mail she received allegedly sent by manager Mike Gonzales describing actions happening "last year." (Exhibit C-13). The screenshot of the e mail does not say who sent it, to whom it was sent, or when, so it is not credible and was not included by management in the ten day discipline. The present case, according to the Human Relations Officer Claudia Cancellare and the Department Head Pablo Caballero, was based solely on the isolated incident of February 16, 2024.

The question then is whether to believe the written complaint of Sabrina Amor, or Keith Douglas's written statement and his testimony at the hearing. Mr. Douglas denies that he was inappropriate or persistent with Ms. Amor. However, his written responses to questions in Exhibits C-10 and C-11 do support Mr. Amor's contentions. His first statement on March 13, 2024 does state that "we had a full in depth conversation which led to her disclosing personal information to me." Ms. Amor contends that it was Mr. Douglas's persistent questioning of her with personal questions that made her uncomfortable. In his second statement when he was asked if he had asked her if she had any nudes on her Instagram account and that was why she did not want to provide him with her username, Mr. Douglas responded as follows: "I did not ask her if she had any nudes. I stated to her that Instagram is a public place and I asked her why if she does not post any explicit photos." Thus, Mr. Douglas is admitting that Ms. Amor had refused to give him her user name but that he persisted with the comment about explicit photos. The Merriam Webster Dictionary defines the word explicit" as "open in the depiction of nudity or sexuality." Therefore, by Mr. Douglas's own words, he confirms that he was persistent in not accepting a "no," and inquiring why she was refusing to give him access to her Instagram if she did not have explicit

(or nude)photos on it.

F. The City's Sexual Harassment Policy

The Department Head contends that the City's Sexual Harassment Prevention Policy and Procedures was violated by Mr. Douglas's actions on Feb. 16, 2024. Sexual Harassment is defined in the policy as "verbal or physical conduct that is sexual in nature, used to threaten, intimidate or coerce; verbal taunting bullying that is sexual in nature that, in the employee's opinion, impairs their ability to perform their job. This includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." (Exhibit C-2, page 2).

The Policy states further as follows: "Sexual Harassment is strictly forbidden. Any behavior that constitutes inappropriate workplace behavior is prohibited, regardless of intent or severity, even if it does not meet the definition of Sexual Harassment above." In the case at hand, there is no direct testimony that Douglas's conversation affected Sabrina Amor's work performance as a scorekeeper. However, in her written complaint, Amor states that after the offensive conversation with Douglas in which she denied him personal information, Douglas made her check people for Identification even though her contract supervisor Che Velasquez had told her it was not her job and Che had told Douglas that Douglas should check for ID's. "Overall this situation made me uncomfortable because he kept flirting with me and wouldn't take no for an answer." (Exhibit C-7, p 2).

It is important to consider that Mr. Douglas was the onsite supervisor for Ms. Amor. Mike Gonzales, the Recreation and Sports Coordinator, who is several steps above Douglas in the supervision chain of command, testified that the Recreation Leaders, such as Kirk Douglas, are the "face" of the program. They interact with the players, customers, and score keepers. They are the onsite employees charged with making certain that the games run smoothly, both on the court and in the stands. Although Sabrina Amor was hired by Marcelino ("Che") Velasquez who contracted with the City to provide referees and score keepers, Mr. Velasquez was not on site to handle issues. The recreation leaders, such as Mr. Douglas, had to make sure the scorekeepers and referees were doing their job, so that they were in fact "supervising" the contracted workers such as scorekeepers. Put in this light, Douglas was a superior who was flirting and insistent with a subordinate about obtaining her personal information and Instagram account user name.

Therefore, the evidence does prove by a preponderance of the evidence that the Sexual Harassment Policy, as written, was violated by Douglas on February 16, 2024.

An allegation in the Notice of Suspension that was not proven was that that “a witness confirmed that you repeatedly stood at the entrance of the gym where the Score Keeper was working and stared at her on more than five occasions causing her to feel uncomfortable in the workplace.” No witness or document presented at this Hearing confirmed this allegation by a preponderance of the evidence. Therefore, these allegations of staring are not proven.

F. The Disciplinary Matrix

The City’s Discipline Policy and Matrix is a policy intended to impose corrective and progressive disciplinary action in a timely and consistent manner.(Exhibit C-3). However, the Matrix “does not substitute for supervisory judgment and does not dictate discipline.” (Exhibit C-3, p. 3). The final determination for discipline rests with the Department Head who has a right to depart from the guidelines and impose different discipline than the Matrix.

The color coded Matrix chart shows that the lesser violations start at Level 1. Level 1 violations begin with a formal counseling for the first offense and progress to termination or demotion for the 4th offense. Level 2 starts at suspension for the first violation. Level 3 starts at 10 day suspension for the first violation. Level 4 starts at termination for the first violation. Sexual Harassment is a Level 3 Violation which starts with a 10 day suspension for the first violation, 15 day suspension for the second violation, and then termination for the 3rd offense. (Exhibit 3, pp. 7-11). This was Kirk Douglas’s first offense of a violation of the Sexual Harassment Policy.

Department Head, Pablo Caballero, testified at this Hearing that he was strict and there was zero tolerance for physical, or verbal harassment. He followed the Sexual Harassment 10 day suspension guideline as he believed the incident with Kirk Douglas on Feb. 16 was serious and was a violation of the Sexual Harassment policy. Claudia Cancellare, the Human Resources Officer who oversees discipline for 7000 City employees, testified at this Hearing. She testified that flirting and asking for a date one time is one thing, and would not be considered sexual harassment without more. However, asking about explicit photos on social media and being persistent about getting a date is sexual harassment, even if just one isolated incident. Both Mr. Caballero and Ms. Cancellare testified that Mr. Douglas was disciplined for the isolated incident on February 16, 2024.


G. Conclusions of Hearing Officer regarding Discipline


1. Section 6.13 of the City Charter imposes on a department head the burden of proof to prove by a preponderance of the evidence that the employee committed conduct alleged in the specifications and that such conduct violated the rules and regulations of the City. In civil law, preponderance of the evidence means the greater weight of the credible evidence. If the evidence is 50/50, then the employee wins, since the City must prove its case by at least 51 percent.
2. The Notice of Suspension for Douglas stated that his conduct violated the City Charter Section 6.13-3 and Civil Service Rule 8 in that he was “wantonly offensive in conduct or language” with a fellow employee or member of the public” and “for just cause.” The Notice of Suspension stated that Douglas had violated the City’s Sexual Harassment Policy.
3. The Department Head has met his burden of proof and has proven by a preponderance of the evidence that the employee committed the conduct alleged in the specifications of the Notice of Suspension, except for the allegation of staring more than five times at the complainant, and that the conduct violated City and/or Department policies.
4. The Department Head has met his burden of proof and proven by a preponderance of the evidence that the employee’s conduct warrants a ten day suspension.

H. RECOMMENDATIONS OF HEARING OFFICER

1. **Regarding the untimely disciplinary Notice of Suspension, I recommend that the ten day suspension of Kirk Douglas not be sustained.**
2. **However, if the Civil Service Commission decides that the Notice of Suspension was not late, then I recommend that the ten day suspension of Kirk Douglas for sexual harassment be sustained.**

Respectfully submitted:


Patricia L. Palafox
Hearing Officer


Date