

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**

Appeal No. 99-09

DECISION

IN THE MATTER OF THE APPEAL OF:

THEOPHILUS ABBEY, Appellant,

vs.

DENVER DEPARTMENT OF HUMAN SERVICES,
and the City and County of Denver, a municipal corporation, Agency

I. INTRODUCTION

The Appellant, Theophilus Abbey, appeals his dismissal from employment, by the Department of Human Services Family Crisis Center (Agency). A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on March 2, and June 10, 2010. The Agency was represented by Assistant City Attorney Neils Loechell. Michael O'Malley, Esq., represented the Appellant. Agency exhibits 1-10 were admitted. The Appellant offered no additional exhibits. The following witnesses testified for the Agency: the Appellant; Bryan Cummings; Trisha Creech; Donna Coulon; Shantel Rothermel; Steven Bates; and Allen Pollack. In addition to testifying on his own behalf, the Appellant presented witnesses Ji Shin and Jonathan Holmes.

For reasons which follow, the Agency's termination of the Appellant's employment is AFFIRMED.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Appellant violated any of the following Career Service Rules: 16-60 A., B., E., J., K., L., O., S., T., Y., or Z.;
- B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to terminate his employment conformed to the purposes of discipline under CSR 16-20.

III. FINDINGS

Abbey was employed as a Youth Counselor in the Family Crisis Center (FCC) from February 2007 until his dismissal on November 2, 2009. The FCC houses youth, ages 12-18. Some of them are placed due to their delinquency, criminal behavior, and truancy, while others are placed to protect them from domestic abuse or child abuse. Given the potential for abusive and victimizing behaviors in the FCC, staff adherence to enforcement protocol and constant monitoring of residents' behavior is of paramount importance.

Abbey worked the middle shift at the FCC, from 2:30 p.m. to 10:30 p.m. A critical component of his duties, as for all Youth Workers and Youth Counselors, was to insure the safety of the Center's residents and staff by upholding the FCC Policy Manual. Abbey received and signed for the manual each of the three years he worked at the FCC.

In his two year employment at the Agency, Abbey was disciplined four times prior to his dismissal. In addition, on April 17, 2009, he was placed on a three-month Performance Improvement Plan (PIP) for failing to meet performance standards and for attendance issues. When he continued to have problems in those same areas, his PIP was extended for an additional three months, until July 15, 2009. His prior disciplinary matters were assessed for violation of Career Service Rules (CSR) for the following incidents.

On July 29, 2008, Abbey received a verbal warning. Abbey asked for leave on July 19 to go to the mountains with visiting family. His supervisor denied the request because other employees had already asked for the same day off. Abbey's absence would have created a staffing shortage and put the Center out of compliance with local and state regulations for staff to resident ratios. Abbey asked his supervisor if discipline would result in the event he failed to show up at work on the 19th. When told it would, Abbey said he probably would accept the discipline, but would refuse to sign it, since he was being treated unfairly. On July 19, Abbey called in at 2:30 p.m. to tell his supervisor he was in the mountains and would not report for work. The supervisor advised Abbey he did not have permission to take the time off. Abbey called back at 3:40 stating there was adequate coverage for the FCC residents, so that his presence was not required. He added that, in any event, he didn't feel well enough to work. [Exhibit 7].

On December 3, 2008, Abbey received a written reprimand. Abbey and four other staff members had accompanied the FCC residents to an outing at the Wheat Ridge Recreation Center on November 15, 2008. One of the FCC youth was ticketed by police for stealing property from the locker room of the recreation center. The FCC staff had failed to maintain surveillance of the youth, failed to take a head count every 15 minutes, and failed to maintain line-of-sight for the residents, all in violation of FCC requirements. All FCC staff members who were assigned to the outing, including the Appellant, were

disciplined. [Exhibit 6].

On January 23, 2009, Abbey received a written reprimand after he had a co-worker clock in for him, and after he clocked in late 10 times between August 20 and October 1, 2008. His supervisors had counseled him about both matters three times previously, including the day before Abbey had a co-worker clock in for him. When his supervisor asked why he had a co-worker clock in for him for his 12:30 shift, Abbey explained "I told Dorian not to clock me in until at least 12:23 p.m." [Exhibit 5].

On March 25, 2009, Abbey received a temporary reduction in pay for taking residents on an outing without noticing one of them was left behind. The youth called an FCC supervisor to ask where were the staff who were supposed to be supervising him. All three staff members on duty, including Abbey, were disciplined, including one who was terminated from employment. [Exhibit 4].

On October 22, 2009, Abbey received a written reprimand for failing to supervise residents and failing to prevent horseplay which resulted in an injury to one of them. The reprimand was also assessed for bullying a resident after the resident reported Abbey's prior misconduct (failing to supervise) to Abbey's supervisor. [Exhibit 10]. In the present case, the following facts were established by a preponderance of the evidence.

Abbey was aware of, and obligated to adhere to, the FCC rules to ensure youth in his care were appropriately supervised and safe. His April 2009 PIP specified Abbey was to: (1) maintain line-of-sight, including ensuring the residents remain constantly within view and hearing of staff, to notify the lead supervisor when there is a loss of line-of-sight, to take a head count when residents move from one location to another and to take another head count upon arrival, to take a head count every 15 minutes when residents are out of the building, and to take a head count upon entering and exiting transportation vehicles; (2) be at work and to arrive punctually, including not to punch in more than 7 minutes after the start of the shift; (3) in the event of an unforeseen absence, to call the on-call supervisor directly, at least two hours before the shift; and to limit personal phone calls except for emergencies, so as not to interfere with job duties. [Exhibit 3].

Abbey failed to maintain these PIP standards. He continued to have poor attendance and punctuality, failed to supervise residence actively pursuant to FCC policy, and used his cell phone excessively for non-emergent, personal calls. As a result, his PIP was continued for an additional three months, until July 15, 2009.

On May 9, 2009, Abbey's supervisor met with him because he was late to work the previous two days, and he failed to contact a supervisor before the beginning of his shifts. His supervisor reminded him he must be at his work station at the start of his shift time, and reminded him to contact a supervisor when ever

he would be late reporting to work.

On May 20, 2009, Abbey's supervisor met with him again concerning punctuality and reporting requirements. She repeated he was to be at his work station at the start of his shift. She told Abbey he was not entitled to a seven-minute window to punch it. Abbey acknowledged the directive.

Abbey complained to his supervisor the following day, May 21, that he neither understood nor agreed¹ with the seven minute window rule. His supervisor explained again the seven minute window applies only to being docked pay for clocking in more than seven minutes late, but that, for performance expectations, Abbey was to be at his work station no later than the beginning of his shift.

Abbey was out on approved sick leave on June 16 and June 17, 2009, and had a note from his dentist to excuse his absence on those dates; however, on June 17 he called his supervisor, Creech, to announce he planned to take pain medication early on June 18 and would then see if he felt well enough to come to work. Creech replied the FCC would be short-staffed, so that Abbey would be required to bring in an additional dentist's note in order to provide a paper trail to justify overtime or re-staffing. On June 18 Abbey left a message for Creech at 10:47 that he would not be in for his 12:30 shift. Creech reminded Abbey to bring a note medically justifying his absence. Abbey replied he contacted his dentist, but was unable to obtain a note.

Creech met with Abbey on August 1, 2009, to remind Abbey he was not allowed to clock in early or clock out late in order to make up unauthorized tardiness. Beginning the following day, Abbey was late without authorization three times and absent once between August 2 and August 15, 2009.

On September 13, 2009, Abbey left the FCC building for 25 minutes during his shift. FCC policy requires staff who leave the building for more than 15 minutes to punch out. Abbey was aware of the requirement but did not punch out. Shantel Rothermel, Abbey's supervisor sought Abbey during his absence. Abbey's co-workers at first told her he went to the bathroom, but when he did not return for some time and she asked again, they recalled he went to pick up a take-out order for himself and for them at a nearby restaurant. When Rothermel questioned Abbey upon his return, and he denied being absent for more than 15 minutes, Rothermel checked his badge and video records to confirm her impression that he was absent more than 15 minutes. A staffing shortage, even temporarily, not only violates FCC policy, but, as indicated above, violates state staffing requirements as well.

¹ The paradox of not understanding, yet disagreeing with the directive remained unexplained. Based on the previous counseling sessions and Appellant's acknowledgements, it is more likely Abbey disagreed with, rather than failed to understand, his supervisor's instruction for him to be at his work station no later than the beginning of his shift rather than within seven minutes afterward.

On April 11, 2009, Creech observed Abbey, while on duty, sitting with his feet up, using his personal cell phone while there were seven residents watching a movie in the adjacent conference room. Abbey agreed it was an inappropriate use of his cell phone at the time. Creech reviewed the FCC policy for youth supervision with Abbey, reminding him staff must be able to both see and hear youth at all times.

On June 13, 2009, Abbey took several youth on an outing to see one of two PG movies approved by Creech. By the time they arrived at the theater, both movies had begun, so Abbey, without seeking approval, took the youth to see a horror movie rated PG-13, "A Haunting in Connecticut," in violation of the FCC program policy, which permits youth to view only G or PG movies, unless a PG-13 movie has the prior approval of a supervisor.

On September 6, 2009, some of the residents were misbehaving aggressively with each other during Abbey's shift. He did not intervene. Against FCC policy, Abbey left the area to pick up car keys for an upcoming outing. During his absence, one of the youth who had been roughhousing, injured another who required stitches.

On September 13, 2009, Abbey was the lead staff member for an outing of the FCC residents to the Garden of the Gods in Colorado Springs. During the outing, Abbey permitted some of the youth to run ahead, out of sight and unsupervised. Abbey spent a significant portion of the outing on his personal cell phone. He was talking on his phone when some of the youth began to throw rocks at others. The incident was reported by a co-worker. Consequently Creech interviewed the youth who confirmed the co-worker's account. About 10 days later, a staff member was trying to take the residents from their rooms to another area. One of the youth was tearful, upset, and refused to come out of his room because Abbey was angry with him for talking to Creech about the Garden of the Gods incident and reporting that Abbey does not supervise them. The youth stated Abbey was "the nicest staff on the unit" and was saddened because Abbey refused to take him to the recreation room, stating "I'm not doing anything for you." When the youth asked why, Abbey replied "you know what you did."

A pre-disciplinary meeting was held on October 21, 2009. Abbey attended with his representative. The representative presented Abbey's written response to the allegations, and provided a verbal statement on Abbey's behalf. The Agency issued a letter of termination on November 2, 2009. This appeal followed timely on November 16, 2009.

IV. ANALYSIS

A. Jurisdiction and Review

Personal jurisdiction. As a Career Service employee at the time of his termination from employment, Abbey is entitled to file a direct appeal under the Career Service Rules. Charter, §§9.1.1. E.(vi), 9.8.2.(A); CSR §19-10 A.1.a.

Subject matter jurisdiction is proper under CSR §19-10 A.1.a., as the direct appeal of a termination (dismissal). I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

The Agency retains the burden of persuasion to prove the Appellant violated one or more cited sections of the Career Service Rules, and to prove its decision to terminate Abbey's employment complied with the purposes of discipline under those same rules. CSR 16-20. The standard by which the Agency must prove its claims is by a preponderance of the evidence.

C. Career Service Rule Violations

1. CSR 16-60 A. Neglect of duty.

This rule is violated when an employee neglects to perform a job duty which the employee knows he or she is supposed to perform. In re Campos, CSB 56-08, 2 (5/21/09) *modifying In re Campos*, CSA 56-08, 14 (12/15/08). The Agency alleged the incidents, above, were breaches of his duties to keep residents within line-of-sight and hearing, to insure their safety, to report to work on time, and to account accurately for his time.

a. Line of sight. One of Abbey's most important duties was to insure the safety of the residents and staff at the FCC. Abbey admitted he was aware of the FCC policies concerning how to deal with fighting and safety issues. [Abbey testimony]. Those policies include keeping line-of-sight and hearing at all times. Abbey was reminded of this obligation several times, including in his PIP on April 17, 2009, [Exhibit 3-1 ("You are expected to consistently follow line of sight policies and procedures for the FCC...")], and by discipline assessed on March 25, 2009, [Exhibit 4-1 ("Follows the Basic Programming and Youth supervision policy and procedure including, but not limited to the line of sight procedure...")]. The awareness element of Neglect is established.

Despite these prior notices, Abbey failed to keep line-of-sight or hearing on September 13, 2009, when he left the building to pick up a take-out order, on September 6, 2009 when he left the area while residents were horse-playing aggressively, and on September 13, 2009 when he allowed residents in his

custody to run ahead at the Garden of the Gods, unsupervised.

Abbey's principal contention was that he did not witness most of the out-of-control behavior of the residents for which he was being held accountable. His response misses the point: it was his leaving the area so that he was unable to see wrongdoing that was neglectful.

b. Failure to discipline. Abbey acknowledged that he is obligated to issue discipline for misbehavior. He failed to issue discipline to those engaged in the September 6, 2009 fight after he became aware of it.

c. Reporting to work/accountability. Abbey acknowledged he needed to be on time for his 2:30 shift. He was placed on a Performance Improvement Plan or PIP, in part due to his attendance issues. He claimed he became confused when the Agency switched to the KRONOS timekeeping system, stating he believed he had a seven-minute window in which to punch in on time; however, that claim fails after he was placed on his PIP on April 17, 2009, since the terms of attendance and recording were explained to him at least twice afterward. During the three months of his PIP, he continued to display poor attendance and punctuality despite repeated counseling. For example, on May 7 and May 8, 2009, he was late without contacting a supervisor and Creech reminded him he was to be at his work station no later than the start of his shift, and to contact a supervisor if he was to be absent. The problems continued, and Creech met with Abbey again on May 20 about attendance and punctuality, specifying being at his desk by the beginning of his shift. At that time, Creech also re-explained the seven minute window was for payroll purposes only, in docking pay, but that he could incur discipline for failure to be at his desk on time. On June 10, Abbey failed to follow the proper call-in procedure when he was absent from work. He called another staff member instead. While the distinction may have been less important as a first violation, his PIP gave him specific steps to follow as the result of many prior attendance issues. [Exhibit 3-2]. On June 18, following his dentist-excused absence, Abbey failed to follow his PIP directives for calling in sick. Even assuming he was still feeling ill, Abbey failed to provide a doctor's note as required by Creech. Between August 2 and August 15, 2009, Abbey was late three times and absent once. On September 13, 2009, Rothermel, unable to locate Abbey, and confirmed by Abbey's badge record and video, that Abbey was absent for more than 15 minutes without punching out. Abbey denied the accusation until Rothermel told him about the video and badge records. Abbey then stated he did not remember the incident. This subsequent denial is not credible. These incidents were not rebutted by Abbey and constitute neglect of Abbey's duty to account accurately for his time.

2. CSR 16-60 B. Carelessness in performance of duties and responsibilities.

While CSR 16-60 A) and CSR 16-60 B), share similar elements of proof, they are distinguished in that, under 16-60 B., it is the Appellant's acts (performance), rather

than his omissions (neglect), which are reviewed. See In re Simpleman, CSA 31-06, 4-5 (10/20/06). Thus, a violation under this rule occurs for performing poorly, rather than neglecting to perform, an important duty.

On June 13, 2009, Abbey took some of the youth on an outing to see one of two movies approved by Creech. Abbey took them instead to see an unapproved, violent horror movie. For reasons stated above, the horror movie was inappropriate viewing. Abbey did not deny he took the residents to see the horror movie, and did not deny the film was not of an approved rating. This incident was a careless performance of Abbey's duty to safeguard the well-being of the residents in his care.

3. CSR 16-60 E. Any act of dishonesty, which may include...false reporting of work hours.

The Agency's claim under this rule was that Abbey dishonestly claimed pay for time not worked. The only evidence directed toward this rule was Abbey's absence on September 13, 2009, when he failed to punch out while picking up a take-out order. Abbey's unexcused absence was established above. His failure to deduct time for that 25 minute absence was dishonest under this rule.

4. CSR 16-60 J. Failing to comply with the lawful orders of an authorized supervisor or failing to do assigned work which the employee is capable of performing.

This rule contains two discrete violations, failure to comply with an order and failure to perform assigned work, whether or not under direct order.

A PIP constitutes the direct order of an authorized supervisor. Abbey's April PIP required him to be at his work station no later than the beginning of his shift. In addition he was given several subsequent instructions by Creech and Barker, that he was to be at his work station at the beginning of his shift and not within seven minutes later, Abbey was therefore on notice of that obligation. Abbey did not directly challenge the lawfulness of the order, rather, he claimed generically, throughout this case, that he was singled out and thus treated unfairly. First, Abbey's history of tardiness and otherwise failing to comply with Agency policy and direct orders to report properly to work justified the Agency's requirements. Also, the policies applied to all staff. Finally, Abbey did not rebut that other staff did not have a problem complying with the reporting protocol of the FCC. For these reasons, the order to report on time was not only lawful but reasonable, and did not unfairly single out Abbey. Consequently Abbey was in violation of 16-60 J.

5. CSR 16-60 K. Failing to meet established standards of performance including either qualitative or quantitative standards...

This rule covers performance deficiencies that may be measured either by qualitative or quantitative standards, such as those one would find in a performance evaluation. In re Castaneda, CSA 79-03, 12 (12/18/02). The

Agency claimed Abbey failed to meet the established standards for resident safety and for timekeeping. [Exhibit 2-1, 2-1].

Keeping line-of-sight is one of the most important safety duties for youth counselors at the FCC, and Abbey was reminded of its importance during previous discipline. [Abbey testimony; Exhibit 3-1; Exhibit 4-2; Exhibit 6-2]. For reasons stated above, the Agency proved Abbey failed to maintain line-of-sight several times, including an incident where a youth was injured.

Abbey replied he could not have violated this rule since his PEPR rating for the past year was "successful." [Exhibit 9]. The Agency rebutted Abbey's contention. Creech, who was new to supervision at the time Abbey's last PEPR issued, was late in issuing the PEPR. She had rated his performance as "Needs Improvement," but due to the late submission, was obligated, under Career Service Rule 13-61 C, to re-issue his PEPR as a "forced Meets Expectations." Nonetheless, Creech's comments concerning Abbey's substandard performance remain a part of his record. [CSR 13-61 C. 3; Exhibit 9]. An employee who receives A PEPR rating of "meets expectations" or better may, nonetheless, be found deficient under this rule based upon the valid downgrading of performance in a specific category of the PEPR. As Abbey's contention was rebutted, and the Agency proved he failed to maintain the established standard of maintaining line-of-sight, this violation is proven by a preponderance of the evidence.

For the same reasons stated earlier regarding accurate timekeeping, the Agency proved Abbey failed to maintain Agency policies for calling in and accurate reporting of his time. This deficiency constitutes a separate violation under CSR 16-60 K.

6. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules...

The FCC requires staff to punch out for all absences of more than 15 minutes during their shift. [Exhibit 2-4]. Regarding his absence for more than 15 minutes on September 13, 2009, Abbey first claimed he did not leave the building for more than 15 minutes. When Rothermel told Abbey her review of his badge records and surveillance video of that day confirmed his absence for 25 minutes, then Abbey told Rothermel he no longer remembered the incident. At hearing, Abbey renewed his first claim that he was not absent for more than 15 minutes. Abbey's amendments to his recollection raise concerns about his credibility in light of objective evidence of his absence. He acknowledged Rothermel had no axe to grind with him, and did not dispute her finding that his building access badge record and surveillance video confirmed his departure for 25 minutes.

Abbey explained alternately at hearing that he was not absent from the building for 25 minutes, rather he first went to the bathroom and then to a work-

related errand in the building before he left to pick up the take-out order, so that the total time may have added up to 25 minutes. Abbey did not explain how the errands within the building explained his absence of 25 minutes outside the building according to badge and video records. A violation of CSR 16-60 L is established.

Regarding the movie outing to see "A Haunting in Connecticut," Bates testified Abbey's decision was a violation of FCC rules. Bates also testified at length that many youth at the FCC have been subjected to violence and abuse or have been witness to the same, and several suffer from post-traumatic stress syndrome, so that the FCC must be highly selective in its choice of movies allowed so as not to trigger any episodes. While Bates testimony was convincing, a violation of this rule requires the violation to be of a written regulation, policy or rule, and none was cited, thus no violation is found for the movie incident.

7. CSR 16-60 O. Failure to maintain satisfactory working relationships with co-workers, other City employees, or the public.

It was unclear from the Agency's evidence that anyone within the purview of the rule was adversely affected by Abbey. The closest evidence seemed to relate to one of the residents who, through hearsay testimony, was reported to have been intimidated by Abbey. [Exhibit 2-5; Creech testimony]. First, the Agency did not make it clear this was the person affected under the rule. Second, it is unclear that FCC residents are persons covered under the scope of the rule. [See, e.g. *In re Weeks*, CSA 26-09, 5 (7/20/09) (*finding inmates are not members of the public*), *rev'd on other grounds*, *In re Weeks*, CSB 26-09 (12/23/09)]. A hearing officer may not infer proof which is neither explicit nor clearly implicit from the evidence. This violation is unproven.

8. CSR 16-60 S. Unauthorized absence from work...

The same facts, above, regarding Abbey's unauthorized absence for 25 minutes on September 14, 2009, also establish a violation under this rule.

9. CSR 16-60 T. Reporting to work after the scheduled start time of the shift.

The Agency claimed Abbey reported to work late on May 7 and 8, 2009, and reported late three times between August 2 and August 15, 2009. [Exhibit 2-4, 2-5]. Abbey did not dispute the occurrences, but argued (1) he was confused by the transition to KRONOS, (2) confused by the seven-minute rule, and (3) after he was directly ordered to be at his work station no later than his start time, he disagreed with the directive. Abbey originally had reason to be confused. His PIP required him "to punch in to the Kronos time keeping system at the beginning of your scheduled shift no later than seven (7) minutes following the scheduled start time." [Exhibit 3-2]. However, after he was subsequently directed to be at his desk no later than his start time, any confusion over the PIP language

became irrelevant as it was replaced by Creech's direct order. His disagreement is also irrelevant. Thus, while Abbey had reason to be confused originally by his reporting requirements, the confusion was amply cured by Creech's directives. Consequently Abbey's continued late reporting to his post after his supervisor's directive to be at his desk not later than his scheduled start time constitutes a violation of this rule.

10. CSR 16-60 Y. Conduct which violates the Rules, the City Charter, the Denver Revised Municipal Code, Executive orders, or any other applicable legal authority.

This rule serves as a catchall for conduct not otherwise covered by the Agency's evidence under other Career Service Rules. Since the Agency proved Abbey's violation of more-specifically referenced rules, no repetition is due here.

11. CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

To sustain this violation, the agency must prove an employee's conduct hindered an agency mission, or negatively affected the structure or means by which the agency achieves its mission. In re Simpleman, CSA 31-06, 10 (10/20/06). Abbey's conduct, particularly in the incident where one of the youth was injured after Abbey failed to control aggressive behaviors when he was present, violated a core responsibility of the Agency, to maintain constant surveillance and control of the residents. Such a breach constitutes a violation of CSR 16-60 Z.

V. DEGREE OF DISCIPLINE

The main purpose of discipline under the Career Service Rules is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-20 to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20.

A. Severity of proven offenses.

Two core functions for youth counselors at the FCC is vigilant surveillance and timely intervention to maintain safety. That Abbey failed both of these Agency tenets establishes the violations were severe.

B. Past Record

Abbey's extensive disciplinary history was chronicled above. In his recommendation to dismiss Abbey, Bates testified an important factor was the number of disciplinary incidents in Abbey's two-year employment. Abbey replied he was continually singled out for punishment where others received no

punishment or lesser discipline for similar incidents. This claim is directly belied by: the December 3, 2008 Wheat Ridge Recreation Center incident where three other staff members received the same discipline and the fourth, who was a new employee without prior incident, received a lesser discipline; the March 25, 2009 incident where a youth was left behind, and Abbey received a reduction in pay while another staff member was terminated; in the September 6, 2009 incident in which a youth was injured, the other staff members on duty were similarly disciplined except a new employee who had no prior incidents. [Bates testimony]. Abbey's four disciplinary actions in his two year employment, along with a failed PIP (requiring continuing the PIP for an additional three months), are aggravating factors in his discipline.

C. Penalty most likely to achieve compliance.

Even after several prior disciplinary actions, Abbey continued to engage in the same behaviors leading to his prior discipline, including his failure to abide by timekeeping requirements, and ignoring the essential duty to maintain line-of-sight. Abbey continued to deny wrongdoing through the date of hearing. Based upon these factors, Bates' assessment, that Abbey was unlikely to change his behavior, was reasonable. In consequence of these factors, the Agency's election to dismiss Abbey was neither clearly excessive nor based upon considerations unsupported by a preponderance of the evidence. In re Mounjim, CSA 87-07, 18 (7/10/08), citing In re Delmonico, CSA 53-06, 8 (10/26/06).

VI. ORDER

A. The Agency's decision to dismiss Abbey from employment on November 2, 2009, is **AFFIRMED**.

B. The Agency's motion, during hearing, to seal the record so as to protect the identity of youth residents at the FCC is **GRANTED IN PART AND DENIED IN PART** as follows:

1. The file for this case, which contains multiple references to minor residents at the FCC, **shall be SEALED**.
2. This DECISION, which is devoid of identifying reference to any youth, **shall NOT be sealed**.

DONE August 9, 2010


Bruce A. Plotkin
Career Service Hearing Officer