

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 95-09

DECISION

IN THE MATTER OF THE APPEAL OF:

JOSEPHINE CARRILLO, Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Josephine Carrillo, appeals her dismissal from employment by the Department of Human Services (Agency) on October 14, 2009. Prior to hearing, Carrillo's claims of discrimination and retaliation were dismissed as abandoned for her failure to respond to a prior Order to Show Cause. For reasons which follow, the Agency's decision to dismiss Ms. Carrillo is **AFFIRMED**.

II. ISSUES

The following issues were presented for appeal:

- A. whether Carrillo violated any of the following Career Service Rules: 16-60 A., B., J., K., L., P., S., Y., or Z.;
- B. if Carrillo violated any of the aforementioned Career Service Rules, whether the Agency's decision to terminate her employment conformed to the directives for discipline under CSR 16-20.

III. FINDINGS

Ms. Carrillo was employed since 1998 as a night shift Youth Worker for the Agency at the Family Crisis Center (FCC). The FCC is a 24-hour co-ed facility which houses at-risk youth 12-18 years old. Some of the youth are victims of crimes, some are abusers, some are sent by protective services, some by the courts, and some by social services. It is a volatile mix which requires constant and vigilant attention by the youth workers who supervise them. Youth Workers' most important duties are to ensure the youth in their care are supervised and safe. Carrillo, as all youth workers, signed a yearly acknowledgment that she reviewed the FCC Policy Manual, most

recently, March 16, 2009. [Exhibit 16]. She acknowledged she was familiar with Agency policies for youth workers. [Carrillo testimony]. Carrillo's immediate supervisor was Shantel Rothermel. Her appointing authority was Allen Pollack.

During the night of September 10, 2009, Carrillo was finishing a 30-45 minute workout, facing the T.V., with her back to the common area, and her co-worker was sitting at the staff desk in the middle of the FCC, when a male resident left his bedroom at 5:20 a.m., walked unnoticed, past the staff desk, to the other side of the common area, entered the bedroom of a female resident, closed the door, and barricaded it. About one minute later, Carrillo, having heard the sound of a door closing, went to investigate, pushed open the barricaded door, escorted the male resident out, and sent him back to his room.

Carrillo wrote on her nightly report for the night of September 10, 2009, [Exhibit 17], that she and her co-worker conducted each bed check required during her shift, a total of 35 bed checks at 15 minute intervals. [Exhibit 1-2 @ L]. A video recording of that shift shows she conducted the first six required checks while her supervisor was present, but only four more during the remainder of the shift after her supervisor left.

On September 21, 2009, Carrillo was incarcerated for 45 days for a DUI conviction. Carrillo attempted, unsuccessfully, to obtain work release. She missed all her shifts during her incarceration. The Agency issued a letter in contemplation of discipline on September 28, 2009, one week after Carrillo began her incarceration.

At the subsequent pre-disciplinary meeting, held on October 7, 2009, Carrillo appeared by telephone from jail, and responded to the allegations. Later, she provided a written statement which was added to her file. The Agency issued its notice of termination on October 14, 2009, and this appeal followed timely on October 29, 2009.

IV. ANALYSIS

A. Jurisdiction and Review

Personal jurisdiction. As an employee of the Department of Human Services, Carrillo was a member of the Career Service personnel system, and may appeal her dismissal 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 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, throughout the case, to prove the Appellant violated one or more cited sections of the Career Service Rules, and to prove its decision to comply with the purposes of discipline. 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 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 claimed Carrillo violated this rule by sleeping while on duty, failing to conduct required bed checks and failing to supervise actively the youth in her care, as she acknowledged is required. Carrillo testified she closed her eyes only momentarily, and that she conducted all required bed checks on September 10; however she qualified that she and her co-worker divided bed check duties and that she conducted her half of the bed checks. Nonetheless, Carrillo did not dispute Rothermel's testimony, that after reviewing video of Carrillo's entire 10-hour shift on September 9, Rothermel found Carrillo performed "one or two" of the required bed checks. This violation is established by a preponderance of the evidence.

With respect to sleeping on duty, the Agency did not provide testimony how long Carrillo was observed with her eyes closed. Without some other, objective evidence, Carrillo's explanation, that her eyes were closed only momentarily, rebuts the Agency's claim.

With respect to the Agency's failure to supervise claim arising out of the September 10, 2009 incident, Carrillo did not dispute she shared responsibility with her co-worker to supervise the youth in their care with sufficient frequency to avoid improper movement youth in the common areas. For example, Carrillo testified even bathroom breaks must be approved, and if more than one youth enters a bathroom, the bathroom area must be supervised. Given the extent to which constant vigilance is required as demonstrated by the frequency of bed checks, and her own admissions, I find Carrillo shared responsibility to supervise the youth on her shift on September 10, 2009, and failed that responsibility when one of the male residents was able to avoid detection and enter a female youth's room.

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. The violations alleged by the Agency involved Carrillo's failures to comply with her duties. Consequently, this rule is inapplicable.

3. 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.

The Agency did not specify which part of this rule it sought to enforce. The evidence suggests the latter, based upon the Agency's claim that Carrillo neglected her duty, pursuant to CSR 16-60 A., to supervise and to account for the youth in her care. Carrillo acknowledged her responsibility to supervise the youth in her care actively and to account accurately for bed checks. She did not question her ability to perform those functions. It was established, above, that Carrillo failed to meet those responsibilities. This violation is established.

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

This rule covers performance deficiencies that can 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 cited the following standards.

PEP/STARS.

Represent the Department in a positive and professional manner.

Follows the performance and conduct standards for the section, and ensures that the essential duties and responsibilities of your job are fulfilled in an acceptable manner.

Takes personal responsibility for performance, attitude, motivation and work products and outcomes.

Initiates corrective action to improve ability to satisfy performance or conduct standards.

Takes personal responsibility for workplace safety.

Considers the safety of others and acts to promote a safe environment.

The Agency cited more specific rule violations than the broad aspirations of these standards. Broad policy statements, such as the service and accountability goals cited by the Agency, are generally unenforceable as disciplinary rules because they fail to provide notice what measures are used to enforce compliance. No violation is found based upon the standards cited by the Agency. In addition, the Agency cited the following standards allegedly violated by Carrillo.

PEP/STARS.

Observes all reporting... standards.

The same evidence which proved Carrillo failed to fulfill her duty to conduct accurate bed checks on September 10, 2009, also proves she violated this standard.

PEP/STARS

Provides basic daily care to all resident youth per program policy.

The evidence suggests safety may be a component of the “basic daily care,” of FCC residents; however, the Agency’s failure to specify if that is the case constitutes a failure of proof. It is not the responsibility of a hearing officer to infer facts to which the agency has not alluded.

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

The Agency cited its Policy and Procedure Manual – Section 3: Basic Programming and Youth Supervision which specifies Youth Workers’ responsibility to conduct and document bed checks every 15 minutes. For reasons stated above, at 16-60 A., Carrillo failed to observe this policy in violation of CSR 16-60 L.

6. CSR 16-60 P. Conviction of or being charged with a crime. Prior to imposing discipline under this subsection, the department or agency shall follow the guidelines contained in subsection 16-61.

Carrillo acknowledged she was sentenced to 45 days incarceration following her conviction for a DUI. The Agency followed the disciplinary procedure required in CSR 16-61 as stated above. This violation is established by a preponderance of the evidence.

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

Carrillo’s incarceration was an unauthorized absence from work under this rule.

8. 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.

The Agency cited specific rules and agency policy elsewhere in this Decision under which it proved Carrillo’s violations. It is unnecessary to repeat them here.

9. 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). Actual harm must be shown. In re Campos et al., CSA56-08, 14-15 (12/15/08).

The Agency established that a fundamental tenet of its mission is to care for and ensure the safety of the youth in its care. However, actual harm caused by Carrillo's neglect was not shown. While Carrillo's conduct constitutes a violation under other Career Service Rules, no violation was proven under this rule.

V. APPELLANT'S CLAIMS

Carrillo made several claims against the Agency which she charged negated any liability on her part.

A. Carrillo claimed that on September 10, 2009, she divided her responsibilities with her co-worker and he was manning the staff desk on September 10, 2009 at the moment the male resident sneaked by the desk and into the female resident's room. Consequently, it was not her responsibility to be aware of residents' movements at that time. The Agency did not dispute that staff frequently divide their responsibilities; however, for reasons stated above, Carrillo did not refute that she shared responsibility for surveying residents' movement, nor did she dispute her responsibility to account accurately for bed checks during her watch, a separate, serious violation of several Career Service Rules referred to above.

B. Carrillo's strongest claim was that the Agency refused her request to continue the pre-disciplinary meeting. She gave two reasons for requesting a continuance. The first is quickly decided. She claimed the area of the jail where she participated in her pre-disciplinary meeting was not private, and therefore was a HIPPA¹ violation. Inmates, of course, lose some of their privacy rights when in confinement, and HIPPA does not provide a remedy to individuals. In legal terms, HIPPA does not confer jurisdiction on individuals, but is conferred specifically to the Secretary of Health and Human Services.²

Carrillo's second related claim, at first, seems more problematic. Carrillo stated the Agency wrote the pre-disciplinary meeting would proceed even if she had no representation. [Carrillo testimony]. She also testified she requested time to contact a representative but was denied the means to do so. *Id.*

The Career Service Rules provide every Career Service employee is (1) "entitled to have a representative of his or her own choosing present at the [pre-disciplinary] meeting." [CSR 16-40 E. 5]. While agencies may choose to deny an employee's request to reschedule the pre-disciplinary meeting the agency "shall accommodate

¹ Health Insurance Portability and Accountability Act ("HIPAA"), Pub.L. 104-191, 110 Stat.1936 (Aug. 21, 1996).

² In enacting HIPAA, Congress mandated the establishment of national standards for protection of the privacy of individually identifiable health and medical information. See *Wallin v. Dycus*, 2009 WL 798839 (D.Colo.2009). HIPAA does not contain any express language conferring privacy rights upon individuals and does not identify a class of persons as the intended beneficiaries of its protections. Instead, it focuses on regulating those who have access to medical information and who conduct certain health care transactions. 42 U.S.C. § 1320d-1. Finally, HIPPA limits enforcement to the Secretary of Health and Human Services. This specific delegation of enforcement strongly indicates Congress intended to preclude private enforcement." *Univ. of Colo. Hosp. Auth.*, 340 F.Supp.2d 1142, 1144-45 (D.Colo.2004).

such requests whenever practicable.” [CSR 16-40 F.]. The compulsory “shall” makes it evident an agency’s discretion to deny a request to continue the pre-disciplinary meeting must be justified by some showing a continuance would not be practicable. In other words, an agency may not simply deny or ignore an employee’s request to continue a pre-disciplinary meeting, without affirmatively providing justification for the denial.

Upon close examination of the record, the document referred by Carrillo appears to be the Agency’s contemplation letter, which contains standard language stating “[i]f you or your representative fails to appear at the scheduled time, I may consider this failure a waiver of your appearance.” More importantly, while Carrillo inferred the Agency denied her a continuance to find representation, which would have been a violation of the Agency’s obligations under CSR 16-40, it seems clear the person Carrillo asked for additional time was her jailor, and not a member of the Agency.³ Without direct or indirect notice of her request to continue the pre-disciplinary meeting, the Agency, of course, cannot be considered to have notice of her request.

VI. DEGREE OF DISCIPLINE

The purpose of discipline 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.

Carrillo’s failure to conduct required bed checks on September 10, 2009 had the imminent potential for disastrous consequences: to the female youth, and to the Agency for its failure to train and supervise its employees.⁴

B. Past Record

During her 11-year employment at the Agency, Carrillo received 11 reprimands for misconduct, including one for sleeping on duty, one for dishonesty about the frequency of conducting bed checks, four for tardiness, two for unauthorized absences, two for inappropriate conduct with a co-worker around the youth-residents, and one for altering an official document (date of a runaway).⁵ Carrillo’s extensive history of violations justified a more severe penalty in the present case.

³ It bears noting the Appellant was asked why she did not bring a representative to the appeal hearing. Her answer indicated she was, understandably, overwhelmed by recent events in her life: her DUI, her termination, loss of child custody, and her homelessness; but an employee’s failure to seek and obtain representation may not, in the absence of malfeasance by the Agency, result in mitigation or abatement of her Career Service Rule violations.

⁴ Erin Mays, Deputy Director, testified without rebuttal that the Colorado Children’s Code and State and Federal License requirements for Treatment Residential Child Care Facilities, require observed bed checks at regular intervals. Mays also stated that she maintained a good relationship with Carrillo, so a motive to treat Carrillo disparately was not in issue.

⁵ [Exhibit 1-4]. Older violations are considered not for the truth of the underlying claims, but for the continuity of violations over the Appellant’s term of employment.

Carrillo claimed her punishment was too severe, given that her co-worker was not terminated for the same instance of neglect. An agency may assess different degrees of discipline against employees who share in malfeasance or nonfeasance, based upon the employees' disciplinary histories. Agency witnesses testified Carrillo's co-worker was assessed a reduction in pay for the same conduct, based upon his good disciplinary record. [Mays testimony; Bates testimony; Pollack testimony].

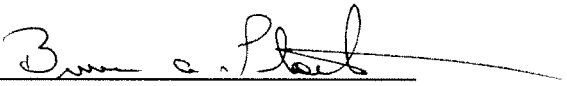
C. Penalty most likely to achieve compliance.

Carrillo's continued denial of wrongdoing, even through hearing, makes it unlikely a lesser degree of discipline would correct the misbehavior. Based upon the discussion, above, the Agency's election to dismiss Carrillo 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).

VII. ORDER

The Agency's decision to dismiss Ms. Carrillo from employment on October 14, 2009, is **AFFIRMED**.

DONE March 16, 2010.



Bruce A. Plotkin
Career Service Hearing Officer