

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

GILA BERLIN, Appellant,

vs.

DENVER HEALTH AND HOSPITAL AUTHORITY,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on Jan. 31, 2011 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and represented herself. The Agency was represented by Susan Stamm, Esq., and Director of Nursing Education Lee Ann Kane served as the Agency's advisory witness. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order:

I. STATEMENT OF THE APPEAL

Appellant Gila Berlin, an Agency Support Technician for Denver Health and Hospitals (Agency), challenges her five-day suspension imposed on Nov. 1, 2010. Agency Exhibits 3-10, 21, 24 and 26 – 29 were admitted, and Exhibits 11 – 18 were rejected. The Agency withdrew Exhibit 20. Appellant's Exhibit D-6 to D-10 was admitted, and Appellant withdrew Exhibits D-1 to D-5 and E.

II. ISSUES

The issues in this appeal are as follows:

- 1) Did the Agency establish by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules (CSR), and
- 2) Did the Agency establish that a five-day suspension was within the range of penalties that could be imposed by a reasonable administrator for violations established by the evidence?

III. FINDINGS OF FACT

Appellant was hired by Denver Health and Hospitals in 1990, and has worked in various support positions during her 21 years at the Agency. From 2008 to the present, Appellant has served as Agency Support Technician under the supervision of Lee Ann Kane, Director of Nursing Education and Staff Development. Appellant's duties include data entry, processing 1,400 performance evaluations completed by supervisors, and processing educational reimbursement requests for the nursing staff. [Exhibit 23-2.] The Nursing Education department shares space with the hospital's Volunteer Services on the second floor of Pavilion A in a small area containing numerous offices, cubicles and meeting rooms.

Shortly before her shift began at 7 am on October 4, 2010, Appellant entered the locked office, and let Clinical Nurse Educator Robert Hibit in at his request. Appellant immediately went to the back to clock in. When she returned to the front where her desk is located, she noticed that the front door had been unlocked. Appellant asked Mr. Hibit if he had unlocked the door. Mr. Hibit said yes. Appellant then said, "Please don't unlock the door." Mr. Hibit replied, "There are people coming. How are they going to get in?" Appellant said, "They'll knock, I'll answer." Mr. Hibit rejoined, "I'm expecting a lot of them." Appellant stated, "Then you stand there and let them in." Appellant became annoyed by what she perceived as Mr. Hibit's pushy demeanor, and so she added, "You're a nasty little thing." [Testimony of Appellant, Robert Hibit; Exhs. 3-4, 6-1.]

As a nurse educator, Mr. Hibit regularly conducts training and informational classes throughout the hospital. He was surprised by Appellant's insistence that the door remain locked, but did nothing to provoke her outburst. He found the comment "a little demeaning," but stated he had no intention of bringing the matter up to Ms. Kane because "we all have bad days."

Appellant, however, testified she "was stewing about it all day." When she later saw Mr. Hibit reviewing a document with Ms. Kane in her office, Appellant stood in the doorway and asked Mr. Hibit, "[w]as that you this morning?" He stated that it was. Appellant admitted at hearing that "I was in my reprimand mode, which probably wasn't right." She shook her finger and loudly scolded Mr. Hibit, "You can never leave me alone in an unlocked area like that." Ms. Kane informed Appellant they were in a meeting. Appellant admitted her voice then went up an octave as she continued to address Mr. Hibit. "You will never speak to me the way you did this morning." Mr. Hibit did not understand either the comments or the reason for Appellant's anger, but made no reply. Appellant testified that she then became angry, "probably because I got shrugs" in response to her comments. "I should have walked out." Ms. Kane then stood up and asked Appellant to step into the next office with her. Appellant replied, loudly enough for everyone in the office to hear, "[y]ou can say whatever you want right here." "I wasn't thinking," admitted Appellant at hearing. Ms. Kane insisted, and led the way into the next room, closing the door behind them.

When they were alone, Ms. Kane informed Appellant that her behavior was inappropriate. Appellant placed her hand on the doorknob and asked her in an

aggressive and belligerent manner if she was finished. Ms. Kane put her hand on the door and said she was not finished. Ms. Kane testified she purposely delayed Appellant's re-entry into the main office because Appellant was still visibly angry and needed time to de-escalate to "minimize the ripple effect" of the incident throughout the office. Ms. Kane suggested that Appellant write a statement explaining the issue that led to the event, but also told her she was planning on issuing a corrective action for the hostile behavior. [Testimony of Ms. Kane; Exh. 7-1.]

On Oct. 14, 2010, Appellant was served with a pre-disciplinary letter. [Exh. 2.] At the pre-disciplinary meeting held Oct. 21, Appellant handed the participants her written statement, in which she stated her belief that "we are here today" for four reasons: 1) her Sept. 14th complaint of discrimination, 2) a comment she made about her supervisor during a job audit, 3) her request for an earlier shift start, and 4) the fact that Appellant questioned her supervisor's actions, including her denial of a STARS performance award for Appellant. As to the allegations in the pre-disciplinary letter, Appellant stated Mr. Hibit "became aggressive, hostile, defensive and argumentative. I did say he was a nasty little thing." Appellant added that she objected for safety reasons to having the office door unlocked before the office's 7 am start time. [Exh. 3.] On Nov. 1, 2010, the Agency suspended Appellant for five days based on her admissions that the asserted behavior occurred and that they violated Agency rules. [Exh. 1.]

IV. ANALYSIS

The Agency bears the burden to establish violations of the Career Service Rules by a preponderance of the evidence, and to show that the discipline was within the range that can be imposed under the circumstances. In re Gustern, CSA 128-02, 20 (12/23/02); Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975).

1. Threats and Violence in the Workplace

The Agency and disciplinary letter alleges that Appellant's comment, "[y]ou're a nasty little thing", violated CSR §§ 15-110, 16-60 L and M, and Denver Health HR Principle and Practice 4-107.

An employee violates CSR § 15-110 by "intimidating, threatening or hostile behaviors . . . or other acts of this type clearly inappropriate to the workplace." CSR § 15-110 defines violence or the threat of violence as:

- A. Intimidating, threatening or hostile behaviors, physical assault, vandalism, arson, sabotage, unauthorized use of weapons, bringing unauthorized weapons onto City property or other acts of this type clearly inappropriate to the workplace.
- B. Jokes or comments regarding violent acts which are reasonably perceived to be a threat of imminent harm.
- C. Encouraging others to engage in violent behavior.

In prior appeals, we have found violations of this rule based on physical assaults (In re Rogers, CSA 57-07 (8/30/07); In re Delmonico, CSA 53-06, 4 (10/26/06)) or threats of violence (In re Katros, CSA 129-04, 7 - 8 (3/16/05)). Here, the comment at issue was insulting, but could not be considered by a reasonable person as either a threat of violence or as similar in type or seriousness to the other descriptors in § 15-110. The remark was not a threat to do anything against Mr. Hibit. In fact, Mr. Hibit testified he considered it demeaning, but dismissed it from his thoughts as merely a sign that Appellant was having a bad day. His mild reaction is strong evidence that the remark did not rise to the level of violent conduct targeted by the rule. See In re Katros, CSA 129-04, 8 (3/16/05). For the same reasons, I find the remark did not establish a violation of CSR § 16-60 M, which bars "threatening, fighting with, intimidating, or abusing employees" (See In re Owens, CSA 69-08, 7 (2/6/09); In re Rogers, CSA 57-07, 6 (3/18/08)), or Agency policy #4-107, Violence in the Workplace, which prohibits "[i]ntimidating, arguing, threatening or hostile behaviors . . . and other acts of this type clearly inappropriate to the workplace."

The Agency also claims that Appellant's later behavior in her supervisor's office violated internal policy #4-107. Appellant admits she angrily reprimanded Mr. Hibit in front of Ms. Kane, and ignored the latter's order to accompany her to the next office to discuss the matter. Appellant denied she interrupted a formal meeting, or shook her finger at Mr. Hibit. However, I find based on Ms. Kane's contemporaneous notes of the encounter that Appellant did interrupt their conversation to lecture Mr. Hibit, and pointed her finger at him to emphasize her irritation. Appellant continued to berate Mr. Hibit despite Ms. Kane's attempt to intervene. Ms. Kane then ordered her to follow her to another office. Appellant refused, stating that Ms. Kane could say whatever she wanted right there. It took a second order from Ms. Kane to gain Appellant's compliance. During their separate meeting, Appellant defiantly placed her hand on the knob and challenged her supervisor by asking, "[a]re you finished?" in an attempt to challenge her authority and intimidate her.

Clearly, these actions were hostile, argumentative and intimidating behavior that could have had a negative effect on the peace of the workplace. Appellant admitted that she "lost it" and that she "wasn't thinking." The Agency proved a violation of policy #4-107 by the evidence of Appellant's conduct during that encounter. Based on that same evidence, the Agency established a violation of CSR § 16-60 L requiring compliance with agency regulations. The Agency also proved that Appellant's angry finger-pointing and aggressive behavior toward her supervisor constituted intimidating conduct prohibited by CSR § 16-60 M.

2. Failure to maintain satisfactory working relationships under §16-10 O

This rule is violated by conduct that an employee knows or reasonably should know will be harmful to coworkers, other City employees, or the public, or will have a significant impact on the employee's working relationship with them, measured by a reasonably objective standard. "The conduct must rise to the level of causing harm or having a significant impact and each case must be assessed on its own facts . . . a single incident of misconduct may be enough to reach this threshold, while the harm to

the coworker or impact on the relationship does not necessarily require a showing that the employee and coworker would be incapable of working together in the future." In re Burghardt, CSA 81-07A, 2 (8/28/08).

Appellant admits that she called Mr. Hibit a "nasty little thing", and later angrily confronted him in the presence of her supervisor. While the conduct was unpleasant, Mr. Hibit chose not to take offense at either incident. He testified that he did not understand Appellant's criticism that he left her alone in an unlocked office, since he was there with her. Mr. Hibit also maintained that his statements to her were not negative in tone. He therefore attributed Appellant's behavior to her own mood rather than anything he did. Mr. Hibit testified that he believes his future working relationship with Appellant will not be adversely affected by this event. The two incidents were undeniably disagreeable, but they did not rise to the level of affecting the parties' working relationship.

Appellant's interaction with Ms. Kane was aggressive and disrespectful. However, Ms. Kane reacted calmly by speaking to Appellant privately, giving her the chance to cool down, while clearly informing her that the behavior was inappropriate and would have consequences. Appellant testified that neither she nor Ms. Kane has "held a grudge" about the event after it occurred, and that they have resumed their positive supervisor/employee relationship. This single incident did not reach the level of seriousness contemplated by this rule, which targets the type of behavior that would significantly impact a working relationship. Therefore, the Agency did not prove Appellant violated CSR § 16-60 M by virtue of her Oct. 4th conduct.

3. Conduct prejudicial to the Agency or City under § 16-60 Z

This rule prohibits two distinct types of misconduct: harm to the agency and harm to the city. In re Norman-Curry, CSA 28-07 and 50-08, 28 (2/27/09), citing In re Simpleman, CSA 31-06, 10 (10/20/06), aff'd CSB (8/2/07). To sustain an allegation of harm to the agency, an employee's conduct must hinder the agency's effectiveness, i.e., the internal structure and means by which the agency achieves its mission. Id. The second part of this rule is violated only where there is actual injury to the city's reputation or integrity. In re Jones, CSA 88-09A, 3 (9/29/10).

The Agency presented no evidence or argument to support its belief that Appellant harmed either the Agency's ability to achieve its mission or the city's reputation or integrity. Thus, the Agency did not establish a violation of this rule.

4. Appropriateness of Disciplinary Action

In evaluating the appropriate degree of discipline, an agency must consider the severity of the offense, an employee's past disciplinary record, and the penalty most likely to achieve compliance with the rules. In re Norman-Curry, CSA 28-07 and 50-08, 23 (2/27/09). An agency's determination of penalty must not be disturbed unless it is clearly excessive, or based substantially on considerations not supported by the evidence. In re Owens, CSA 69-08, 8 (2/6/09).

While admitting that she should have been disciplined for her admitted behavior, Appellant contends that a five-day suspension was too severe. She argues that being "read the riot act" by her supervisor in a written reprimand would have been more fitting given the nature of the misconduct. The Agency countered that Appellant had been given written reprimands for similar discourtesy to fellow employees in both 2005 and 2007, but they did not have the desired effect of changing Appellant's behavior. [Exhs. 9, 10.] Appellant testified that she tells her fellow employees if they have a problem with her, they should tell her about it so she can fix it. "I bark, I don't bite." [Testimony of Appellant.]

The evidence supported the Agency's conclusion that a written reprimand would have been disregarded by Appellant, who believes others need to tell her if unpleasant comments she makes offend them. Appellant admitted that her behavior on Oct. 4th was inappropriate for the workplace and merited discipline, and the evidence supports those conclusions. The remaining issue is whether a five-day suspension was within the range of discipline that could be considered for the proven violations by a reasonable administrator.

After the pre-disciplinary meeting, Employee Relations Manager Sherry Stevens reviewed Appellant's entire personnel history, including discipline and evaluations, to determine whether Appellant was correct in stating that her past history contained only positive comments about her interpersonal skills. As a result of this review, Ms. Stevens concluded that Appellant had been given two written reprimands and a one-day suspension for inappropriate communication with other employees. The suspension was issued in 1994, and that exhibit was rejected as too remote in time to be useful regarding this disciplinary action. [Exh. 11, rejected at hearing.] As a result of her conclusion that the next step in progressive discipline would be termination after the 1994 suspension, Ms. Stevens recommended termination as the appropriate penalty here. Instead, Appellant's supervisor successfully argued for imposition of this five-day suspension based on her belief that Ms. Berlin's work was good and a suspension would achieve the goal of motivating a positive change in behavior. Based on Appellant's disregard of previous written reprimands, I conclude that the five-day suspension was consistent with the principles of progressive discipline. I also find that it was carefully tailored to communicate to Appellant that this type of behavior will not be tolerated, and to provide a deterrent for Appellant to comply with the Agency's standards of interpersonal conduct.

Appellant also argues that the discipline was motivated by retaliation for her Sept. 14th complaint of discrimination. On that date, Appellant told her supervisor that after she had returned from leave taken for religious reasons and commented about the accumulated work, a co-worker remarked, "[t]hat's what happens when you take three days off". [Exh. 5-2.] Ms. Kane investigated the allegation of religious discrimination at the request of Employee Relations Manager Sherry Stevens. The employees present at the time of the remark confirmed to Ms. Kane that the co-worker, Support Technician Joyce Brown, stated, "[w]hen you're out, your work piles up", and that no one thought the comment had anything to do with religion. [Testimony of Sherry Stevens.]

The evidence does not support the allegation that Ms. Kane retaliated against Appellant for her discrimination complaint. First and most importantly, Ms. Kane was not the target of the complaint. The investigation's witnesses unanimously confirmed that the statement made by Ms. Brown made no reference to Appellant's faith or religious practice. Finally, I am persuaded by Ms. Kane's even-tempered response to Appellant on Oct. 4, despite provocation, and her successful advocacy for a less extreme penalty, that she bore Appellant no ill will and did not intend to retaliate against Appellant for her complaint of discrimination against another employee.

Appellant argued at the pre-disciplinary meeting and at hearing that her actions were justified by her concerns for her personal safety. Ms. Kane testified that Appellant had never spoken to her about any security issues, nor asked her for permission to leave the door locked until the office opened at 7 am. In fact, Appellant previously sought and was granted permission to start work at 6:30 am, at which time the door was unlocked to allow supervisors to deliver their performance evaluations. Moreover, a concern about safety does not justify the angry behavior that supports this disciplinary action.

Appellant's remaining allegations relate to the results of a year-old audit, a change in her work shift, and Ms. Kane's failure to recommend Appellant for a performance award. While Appellant was aggrieved by each of these decisions, they do not individually or in combination support a claim that Ms. Kane's disciplinary decision was itself contrary to the rules.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered that the Agency's suspension action dated Nov. 1, 2010 is AFFIRMED.

Dated this 11th day of March, 2011.


Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with the requirements of CSR § 19-60 et seq., within **fifteen** calendar days after the date of mailing of the Hearing Officer's decision, as stated in the decision's certificate of delivery. The Career Service Rules are available as a link at www.denvergov.org/csa.

All petitions for review must be filed with the:

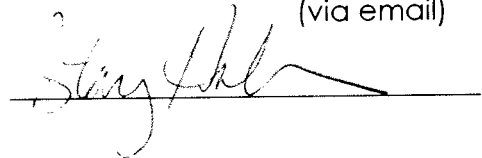
Career Service Board
c/o CSA Personnel Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
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AND

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EMAIL: CSAHearings@denvergov.org.

I certify that on March 11, 2011, I forwarded a correct copy of the foregoing Decision and Order as indicated below:

Gila Berlin, gila.berlin@dhha.org (via email)
Jean Holzwart, Office of General Counsel, Jean.Holzwart@dhha.org (via email)
Susan Stamm, Esq., sstamm@hkjp.com (via email)



A handwritten signature in black ink, appearing to read "Jean Holzwart", is written over a horizontal line.