

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

Appeal No. 263-00

ORDER

IN THE MATTER OF THE APPEAL OF:

RANDY BURG, Appellant,

v.

Agency: **DENVER HEALTH AND HOSPITAL AUTHORITY.**

The hearing on this matter was scheduled for January 29, 2001. On January 23, the Denver Health and Hospital Authority (referred to as the "Hospital Authority"), by and through Chris H. Mootz, Assistant City Attorney, moved to continue this matter because one of the Agency's witnesses, Angela Martinez, was unavailable for the hearing due to a death in her family. The Motion to Continue was not opposed by Randy Burg (referred to as "Appellant"), who appeared by and through Stephen M. Munsinger, Esq. Before making a decision, the Hearing Officer reviewed not only the Motion to Continue, but also the Hospital Authority's proposed exhibits submitted prior to the hearing. After reviewing the proposed exhibits, the Hearing Officer decided not to grant the Motion to Continue and ordered the parties to appear on January 29 for a prehearing conference.

At the prehearing conference, the Hearing Officer indicated that she had reviewed the Hospital Authority's proposed exhibits, which she deemed admitted for purposes of this hearing, and that, based upon the information contained in the Hospital Authority's exhibits, that there seemed to be no grounds for upholding the Hospital Authority's actions in terminating Appellant. Appellant was terminated for alleged violations of CSR §16-50 A. 1), 13) and 20) and §16-51 A. 3), 5) and 11).¹

¹ CSR §16-50, Discipline and Termination, provides, in relevant part:

A. Causes for dismissal.

The following may be cause for dismissal of a career service employee. A lesser discipline other than dismissal may be imposed where circumstances warrant. It is impossible to identify within this rule all conduct which may be cause for discipline. Therefore, this is not an exclusive list.

- 1) Gross negligence or willful neglect of duty.

The Hearing Officer was concerned because the factual basis for the termination was Appellant's failure to appear for work on November 1, 2000, a date for which he clearly had a medical excuse which provided that he was not cleared to return to work until November 2. (Exhibits 7 and 9)

The City Attorney was allowed to proffer evidence that Ms. Martinez, the unavailable witness, would testify that she had a conversation with Appellant on October 31 in which she indicated that Appellant was to return on November 1. The Hearing Officer informed the City Attorney that, even if this were true, Appellant still had the medical excuse and, even if Ms. Martinez's proffered testimony was taken in the best light for the Hospital Authority, the confusion about whether Appellant was to return on November 1 or November 2 was insufficient as a matter of law to support the termination of a long-term (nine-year) employee from his job for unauthorized leave, abuse of sick leave, or a violation of the Hospital Authority's Principle and Practice #4-122, which prohibits two absences without appropriate notice in a rolling 12-month period (see, Exhibit 2) when the second unauthorized absence alleged was on November 1. The Hospital Authority's actions in

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- 13) Unauthorized absence from work, including but not limited to: when the employee has requested permission to be absent and such request has been denied; leaving work before completion of scheduled shift without authorization; or taking unauthorized breaks.
 - 20) Conduct not specifically identified herein may also be cause for dismissal.

CSR §16-51, Causes for Progressive Discipline, provides, in relevant part:

- A. The following unacceptable behavior or performance may be cause for progressive discipline. Under appropriate circumstances, immediate dismissal may be warranted. Failure to correct behavior or committing additional violations after progressive discipline has been taken may subject the employee to further discipline, up to and including dismissal from employment. It is impossible to identify within this rule all potential grounds for disciplinary action; therefore, this is not an exclusive list.
 - 3) Abuse of sick leave or other types of leave, or violation of any rules relating to any forms of leave identified in Rule 11 Leave.
 - 5) Failure to observe departmental regulations. (to wit: Denver Health Employee Principles and Practices, 3-122 Absenteeism)
 - 11) Conduct not specifically identified herein may be cause for progressive discipline.

terminating Appellant was, *per se*, an abuse of discretion and arbitrary and capricious.

The Hospital Authority argued that, while Appellant had originally requested Family Medical Leave for the period of October 18 through November 1, he never filed the requisite paperwork, although warned several times to do so (see Exhibits 5, 6, and 8). As a result of Appellant's failure to provide the necessary paperwork, his FMLA leave was eventually denied. The Hearing Officer rejected this argument because the denial of FMLA leave occurred after Appellant had been terminated. Whether the Appellant would have complied with the demands for documentation and receive authorization became moot on December 1. Therefore, the denial of FMLA could not be used as justification for the earlier decision to dismiss Appellant. Also, any disciplinary action arising from the allegedly unauthorized leave due to the fact that Appellant had not completed his FMLA request was premature on December 1, the date of the notice of dismissal, because the denial of the FMLA request occurred at least a week later.

The Hospital Authority claimed that Appellant should have ignored the instructions of his physician and come into work on November 1. The Hearing Officer finds this argument disingenuous, especially as the Hospital Authority, which should be more conscious of medical advice, not less, is the employer. When the Hospital Authority made this argument, it also claimed that Appellant had the burden of proof about the justifiability for his failure to come to work when his supervisor told him to. This is an incorrect position. This is a termination case. It is well established that the Hospital Authority bears the burden of proof, not the Appellant, that its actions in terminating Appellant were in compliance with the CSR and were not arbitrary and capricious, which, as stated above, the Hospital Authority's own exhibits prove were legal standards that were not met. Even if this were not the case, the Hearing Officer finds the Appellant's failure to come into work on November 1 was justified based upon the medical certificate excusing him from work through November 1.

While the Hearing Officer did not specifically address the alleged violation of CSR §16-50 A. 1) during the prehearing conference, she also finds that Appellant's conduct on November 1 does not constitute either gross negligence or willful neglect of duty. Neither "willful" nor "gross" are defined in the CSR, requiring the Hearing Officer to look elsewhere for definition.

Negligence is a failure to use reasonable care or a failure to act in a reasonably prudent manner under the circumstances. Lavine v. Clear Creek Skiing Corp., 557 F.2d 730 (10th Cir. 1977); Metropolitan Gas Repair Service, Inc. v. Kulik, 621 P.2d 313 (Colo. 1980); Rice v. Eriksen, 476 P.2d 579 (Colo. App. 1970). Gross negligence involves a higher form of culpability than mere negligence. "Gross" in this context means flagrant or beyond all allowance, Lee v. State Board of Dental Examiners, 654 P.2d 839 (Colo. 1982), or showing an utter lack of responsibility. People v. Blewitt, 192 Colo. 483, 563 P.2d 1 (1977). Willful neglect

of duty transcends any form of negligence and involves conscious or deliberate acts. See Turner v. Lyon, 189 Colo. 234, 539 P.2d 125 (1976); Drake v. Albeke, 188 Colo. 14, 532 P.2d 225 (1975).

“Gross” has been defined as “immediately obvious” or “glaringly noticeable usually because of inexcusable badness or objectionableness.”²

“Gross negligence” is defined by Black’s as:

The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness. “Gross negligence is substantially higher in magnitude than simple inadvertence, but falls short of intentional wrong.” (Cite omitted)³

“Willful” is generally defined as “obstinately and often perversely self-willed; done deliberately.”⁴

Black’s defines “willful” as:

Proceeding from a conscious motion of the will; voluntary. (Cite omitted)...Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary...A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. (Cite omitted.)⁵

The use of these terms in the CSR as a basis for discipline requires the employee to be purposely or willfully performing his duties at an intentionally substandard or inappropriate level. See In the Matter of the Appeal of Dennis Fresquez, CSA Appeal No. 154-00. That is not the case here. The gravamen of this matter is Appellant’s failure to come to work on November 1 while he still was under a medical excuse despite his indication to his supervisor (Ms. Martinez) that he would come to work on November 1 if she required it. The terms “gross neglect or willful misconduct” are not meant to cover conduct which arises due to conflicting directions, one from his supervisor, the other from his physician. Under the facts proffered by the City Attorney, Appellant’s failure to come to work on November 1 doesn’t rise to the level of mere negligence, no less gross negligence. He definitely did not engage in willful misconduct since he had the justifiable excuse that his medical leave extended through November 1.

² Miriam-Webster’s Collegiate Dictionary, 10th Ed., 1993

³ Black’s Law Dictionary, 4th Ed., 1951

⁴ Miriam-Webster’s, *op cit*.

⁵ Black’s, *op cit*.

Finally, the Hearing Officer finds that neither of the "catch-all" provisions cited, CSR §§ 16-50 A. 20) and 16-51 A. 11), are established as a matter of law. These provisions permit dismissal and/or progressive discipline for "conduct not specifically identified" by other portions of CSR §§16-50 A. and 16-51 A. However, the catch-all provisions are not meant to give an agency another bite at the apple when it has not substantiated violations of specifically enumerated provisions. They are there only for the rare times when an employee engages in an activity that that CSA Board did not think of when listing specific employee misconduct that might constitute reasonable grounds for dismissal or progressive discipline but which might justify such action by an agency. That is not the case here. The Hospital Authority claimed that four very specific provisions substantiated the basis for the decision to terminate, not that there was some other reason, not otherwise enumerated, that was grounds for the decision. This case failed because of a matter of proof, not because the alleged misconduct did not fit an enumerated violation of the CSR.

Therefore, for the foregoing reasons, the Hearing Officer FINDS the Hospital Authority acted in an arbitrary and capricious manner and abused its discretion when it disciplined Appellant and dismissed him from his employment. The appeal is GRANTED in its entirety. The Hospital Authority is ORDERED to reinstate Appellant to his position, with back-pay and benefits from December 1, 2000. While the Hospital Authority has the right to discipline Appellant for unauthorized leave due to his failure to comply with its numerous requests for complete paperwork for his FMLA request for the period of October 18 through November 1, 2000, it is strongly recommended that the Hospital Authority give Appellant a reasonable, but short, opportunity to provide the necessary paperwork. If Appellant continues to fail to comply with such request, the Hospital Authority may then discipline Appellant for unauthorized leave to the level the Hospital Authority deems appropriate, up to and including dismissal, as provided for by CSR §§16-509 A. 13) and 16-51 A. 3) and 5).

Dated this 6th day of February 2001.



Robin R. Rossenfeld
Hearing Officer for the
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing ORDER by depositing the same in the U.S. mail, this 6th day of February 2001, addressed to:

Stephen M. Munsinger, Esq.
501 South Cherry Street
One Cherry Center, Suite 610
Denver, CO 80246

Randy Burg
1326 Xavier St.
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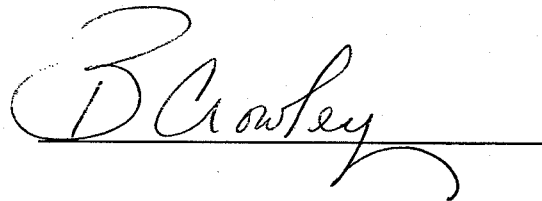
I further certify that I have forwarded a true and correct copy of the foregoing ORDER by depositing the same in interoffice mail, this 6th day of February 2001, addressed to:

Chris H. Mootz, Esq.
Assistant City Attorney

Dr. Patricia Gabow
Denver Health and Hospital Authority

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A handwritten signature in cursive script, appearing to read "B. Crowley", is written over a horizontal line.