

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 03-10

DECISION

IN THE MATTER OF THE APPEAL OF:

KERRIE CADY, Appellant,

vs.

DENVER COUNTY COURT,

and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

In these consolidated appeals, the Appellant, Kerrie Cady, appeals her suspensions of one and three days, assessed on December 28, 2009 and January 26, 2010 respectively, by her employer, the Denver County Court, for alleged violations of specified Career Service Rules. A hearing concerning these appeals was conducted by Bruce A. Plotkin, Hearing Officer, on March 12, 2010. The Agency was represented by Robert A. Wolf, Assistant City Attorney, while the Appellant was represented by Michael O'Malley, Esq. Agency exhibits 1-22, and Appellant's exhibits A, B, D, and E-1 through E-16 were admitted without objection. For ease of reference, Agency Exhibits 1-26 relate to appeal #03-10, while Exhibits 27-47 relate to appeal #06-10. Witnesses Terrie Cooke and Tanya Hayes testified for the Agency, which also called the Appellant as its witness, while Michelle Schroeder and Mike McSpadden testified for the Appellant who also testified during her case-in-chief.

Both parties set forth convincing premises. The Agency claims Cady violated the above-referenced Career Service Rules by making seven significant errors in posting bonds between October 20 and December 2, 2009. The Appellant acknowledged making the errors, but claims no rule was violated, and no punishment was justified, because the number of errors fell within the parameters for successful performance in her work review, and no other standard of performance was communicated. The Agency did not dispute the number of errors alleged falls within a "successful" performance rating, but claimed the Appellant's conduct violated other, non-measured, policies. For reasons which follow, both suspensions are **AFFIRMED**.

II. ISSUES

The following issues were presented for appeal:

- A. Whether, in each appeal, the Appellant violated any of the following Career Service Rules: 16-60 A., B., J., or K;
- B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to suspend her for one day in Appeal #03-10, and for three days in Appeal #06-10, conformed to the purposes of discipline under CSR 16-10.

III. FINDINGS

A. Appeal # 03-10

The Appellant is employed as a Judicial Assistant by the Agency in the Warrants Office. Her duties include processing bonds for criminal defendants. Her immediate supervisor is Tanya Hayes. Hayes signed both notices of discipline in the current cases. The Agency assessed discipline in Appeal # 03-10 for the following four incidents, all of which Cady acknowledges occurred. [Cady testimony].

October 20, 2009. In posting a bond, Cady failed to cross-check the bond on another screen, and therefore failed to notice an execution warrant of 180 days for the defendant, meaning he should not have been able to post bond, but was required to go directly to jail to serve a 180 day sentence.

November 4, 2009. Cady failed to collect \$100 of a \$130 bond, leaving her account \$100 short for her shift.

November 7, 2009. In the process of posting a bond, Cady selected the incorrect bondsman's name from a drop-down list. As a result, the bond was issued with the incorrect bondsman as surety for the bond.

November 9, 2009. In the process of posting a bond, Cady correctly set a bond return date, i.e. the date on which the defendant must appear in court, then mistakenly vacated the bond return date.

A pre-disciplinary meeting was held on December 16, 2009. Cady appeared with her union representative. The Agency served its notice of a one-day suspension on December 28, 2009. This appeal followed timely on January 7, 2010.

B. Appeal #06-10. The Agency assessed discipline in Appeal # 06-10 for the following four incidents. Cady acknowledged each of the incidents occurred as described.

November 25, 2009. In the course of posting a bond, Appellant entered the case in duplicate under a different case number. The Sheriff's Department spotted the error

and advised Appellant. In the process of correcting the original error, she set the bond return date for the wrong courtroom. Left uncorrected, courtroom staff would be searching for a non-existent file in one courtroom, while staff in other courtroom would be looking for a non-appearing defendant who should not be there. The proper procedures were issued in 2004.

December 2, 2009. After a Defendant posted bond, Cady cancelled his warrant on the "Defendant Information" screen, but failed her duty to verify the warrant was removed from "warrant ordered" status, with the result that a warrant was incorrectly issued, and County Court Marshalls were dispatched the following day to arrest the defendant. Only because the Marshalls took extraordinary measures, to verify his warrant status, was a false arrest averted. The proper procedures were distributed to all staff in May 2008, and again in October 2009.

December 2, 2009. The same day, the Appellant set a bond return to the wrong courtroom. Her supervisor instructed Cady on December 9 to correct the courtroom error, and to notify both the defendant and his surety. The changes to courtroom assignments had been in place since July 2009, and Appellant was aware the courtroom where she set the bond return has never been used for bond returns.

A pre-disciplinary meeting was held on January 12, 2010. The Appellant appeared with her union representative and provided a statement. On January 26, 2010, the Agency served its notice of a three-day suspension on the Appellant. This appeal followed timely on February 1, 2010.

The Appellant's annual work evaluation, called a Performance Enhancement Program Report, or PEPR, addresses the required performance level for handling posting of bonds. It states, in pertinent part

Duty: Processing Bonds & Fines

Primary Clerks-To be successful, no more than [sic.] 48 errors per year. To be exceptional, no more than 24 errors year [sic.].

[Exhibit E-13]. For the rating period 9/1/08-9/1/09 Cady's work in this area was deemed satisfactory.

IV. ANALYSIS

A. Jurisdiction and Review

Personal jurisdiction. As a Career Service employee, Cady may appeal discipline under the Career Service Rules. [Charter, §§ 9.1.1. E.(vi), 9.8.2.(A); CSR 19-10 A].

Subject matter jurisdiction. Jurisdiction is proper under CSR 19-10 A. 1. b., as the direct appeal of a suspension. 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 impose one and three day suspensions complied with the purposes of discipline under the Career Service Rules. CSR 16-20. The standard by which the Agency must prove each of its claims is a preponderance of the evidence.

C. Career Service Rule Violations

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

A violation of this rule occurs when an employee neglects to perform a job duty which the employee knows he or she is supposed to perform. In re Compos et al, CSB 56-08, 2 (5/21/09). None of the Agency's allegations involve Cady's omission to perform a duty, rather the allegations allege Cady performed certain known duties improperly. No violation is found under this rule.

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

While this rule shares similar elements of proof with CSR 16-60 A., Neglect of duty, they are distinguished in that, under this rule, it is the Appellant's acts (performance), rather than her 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 Agency claimed Cady executed her duty to process bonds accurately in substandard fashion in each of the seven cited instances.

Cady did not reply directly to the allegation that she was careless. Instead, she argued that, at the time discipline was assessed, she had not exceeded the number of errors that would downgrade her annual performance rating from "successful" to something less. In its own context, the Appellant's argument is convincing. "The PEP plan may be used as a basis for disciplinary action under Rule 16 DISCIPLINE if an employee's performance fails to comport with the standards set forth in the PEP plan." CSR 13-20. A. The sanction for substandard performance under CSR 13 is performance review downgrades. However, contrary to Cady's assertion, that is not the end of the matter. Substandard work performance is also subject to the panoply of penalties under CSR 16. "The purpose of discipline is to correct inappropriate behavior **or performance**, if possible." CSR 16-20. [emphasis added].

Cady's interpretation, that penalties for poor performance must be limited to CSR 13 performance standards, would render meaningless the "**or performance**" language in CSR 16-20, above, and would require agencies to assess performance penalties only under CSR 13, and, even then, only at the end of an annual review.

Cady acknowledged she made each mistake, described above, in performing her duty to process bonds correctly, [Cady testimony; Exhibits 3; 14; 18], and was aware of the proper procedure to avoid such mistakes. Each mistake thus establishes a

separate violation of CSR 16-60 B.

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.

At issue here was the latter half of this rule. The Agency did not allege Cady failed to process bonds in either case. Rather the Agency alleged she was careless. For reasons stated above in the discussion of CSR 16-60 A., Neglect of duty, no violation is found under this rule.

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

This rule covers measured performance deficiencies, such as those one would find in a performance evaluation. *In re Castaneda*, CSA 79-03, 12 (12/18/02). The Agency must provide notice of the standard. *In re Mounjim*, CSA 87-07, 4 (CSB 1/8/09). As opposed to the Agency's policies, cited immediately below at CSR 16-60 L., the only measured performance for which the Agency provided notice to Cady was the Appellant's annual review (PEPR). [Exhibit 2-1, 2-2, 28-1, 28-2]. The Agency acknowledged, at the time it cited her deficient performance under both cases, Cady had not exceeded the number of errors allowed by the standards set forth in her PEPR. Consequently, no violation is found under this rule.

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

Unlike CSR 16-60 L., this rule may include performance deficiencies which are not limited to measured evaluations. An agency's written policies fall under this provision. The Agency claimed Cady failed to meet its policies contained in Exhibits 13, 35, 36, 37, 38, 42, and 45. The next step is to examine the referenced exhibits and to determine for which, if any of them, the Agency provided notice to the Appellant what policy, rule or regulation she was alleged to have failed.

a. Exhibit 13. This exhibit contains an undated instruction how to balance credit card charges. Hayes testified the document is a page from the procedures manual, that Appellant was aware of it, and that she was directed to follow its requirements prior to making a mistake in handling a credit card bond transaction on November 4, 2009. Cady did not dispute Hayes' assertion, thus Cady was on notice of the procedures in this policy. Her error on November 4, 2009, cited in the contemplation of discipline letter, [Exhibit 2-2], could have been avoided by following this policy, and therefore the error was a violation of CSR 16-60 L in appeal #03-10.

b. Exhibit 35 contains an "outline of bond case management training" issued in 2004 and has not changed. It contains a procedure to ensure a duplicate case is not created, by checking the THEMIS program to ensure a case for a particular defendant is not already entered. [Hayes testimony]. Cady did not dispute she was aware of this

procedural policy, so her failure to follow it, resulting in the creation of a second, ghost file, was a violation of CSR 16-60 L., on November 25, 2009, in Appeal #06-10.

c. Exhibit 36 contains an email, dated April 23, 2004, to all bonding office employees, that established the procedure for entering preliminary advisement bonds. The procedure has not changed. Hayes testified the error cited immediately above would not have occurred if Cady had followed this procedure. This testimony was un rebutted and therefore also establishes a violation of CSR 16-60 L. in Appeal #06-10.

d. Exhibit 37 is a duplicate of Exhibit 35. It was merely sent to different recipients earlier the same day, then re-distributed to all bonding office staff. No additional violation was established here.

e. Exhibits 38, 39, 40, 42. These exhibits establish bonding office procedures for vacating warrants when defendants post bond. [Hayes testimony]. Examples of the procedures are shown in Exhibits 39-2 through 39-8, and 40-2 through 40-9. Cady did not dispute she was aware of the procedures in these exhibits prior to December 2, 2009. Specifically, at the top of Exhibit 39-2, the entry "WO" means "warrant ordered," so when a defendant posts bond the "WO" must be changed to avoid a false arrest, as indicated by language at the bottom of 39-2. [Hayes testimony]. Notably, 39-3 explains not to use a certain screen, the F2 screen, to cancel a warrant. Nonetheless, that is what Cady did on December 2, 2009. Exhibit 40-2 shows the screen for the December 2, 2009 bond entered by Cady. The entry marked "Status: WARR" shows the arrest warrant was active even after Cady processed the Defendant's bond, whereas it should have read "Bond" or "Clear." [Hayes testimony]. Exhibit 42-1 re-explains the previous procedure how to avoid an erroneous issuance of a warrant after bond is posted, but added two additional steps after the December 2, 200 incident to enhance oversight. However, the underlying procedure did not change. [Hayes testimony]. Cady was aware of these procedures, so her failure to follow established procedures on December 2, 2009, resulting in the erroneous issuance of an arrest warrant after a defendant posted bond, in Appeal #06-10, was a violation of CSR 16-60 L.

f. Exhibit 45 is a June 29, 2009 email to all bonding office employees. It established a new procedure for setting all criminal probation matters to a different courtroom than before. Cady acknowledged she was aware of this procedure. She failed to follow this procedure in Appeal #06-10, in violation of CSR 16-60 L, on December 2, 2009.

V. 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 the offenses.

Cady claimed she was singled out for her mistakes unfairly because co-workers made the same kind and quantity of errors, yet were unpunished or punished less severely. Cady's evidence did not support this claim. First, her witnesses, while admitting to making mistakes, did not make the number of mistakes made by Cady within a similar period. When Cady's co-worker, Shroeder, was asked about errors she made, she replied "I don't make that many errors." [Shroeder cross-exam]. McSpadden forthrightly acknowledged everyone in the bonding office makes mistakes, and that it can be a stressful environment. However, McSpadden did not believe, contrary to Cady, that he was immune from discipline for making fewer than the maximum number of errors allowed to achieve a satisfactory work review. [McSpadden cross-exam]. More importantly, Cook, who as a supervisor in the bonding office, is in a position to see the type and number of errors committed, testified

no one [in the bonding office] has made that quantity [of errors] in this period of time. Typically, what happens is you get is one error, and you discuss it with the employee and 'O.K., well I've got it, I'll pay attention more closely the next time,' but it's not one error right after the other. This is a lot of errors.

[Cook testimony]. This testimony was un rebutted and therefore affirms the extent and seriousness of Cady's mistakes.

B. Previous History

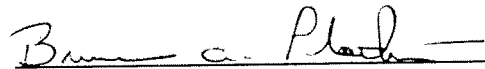
In appeal #03-10, one of Cady's errors was her failure to reconcile her cash and credit card totals so that she ended up \$100 short at the end of her shift. She previously made the same error for which she was counseled and for which she received a verbal warning. [Exhibit 29].

C. Penalty most likely to achieve compliance. A hearing officer must not disturb an agency's determination as to the degree of discipline unless it was clearly excessive or based substantially 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). In light of Cady's prior disciplinary record and the severity of her violations, the Agency's assessment of a one-day suspension in appeal #03-10 was not clearly excessive, nor was it based upon considerations which were unsupported by a preponderance of the record. Due to her continued carelessness, the agency was justified in assessing a three-day suspension in appeal #06-10.

ORDER

For reasons stated above, the Agency's assessment of a one-day suspension in appeal #03-10 and a three-day suspension in appeal #06-10 are AFFIRMED.

DONE April 22, 2010.



Bruce A. Plotkin
Hearing Officer
Career Service Board

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board to review this order, in accordance with the requirements of CSR 19-60 through 19-80, within fifteen calendar days after the date this order is delivered as stated in the attached certificate of delivery. **Please note the 15-day deadline begins from the date sent, not the date received.** The Career Service Rules are available as a hyperlink at <http://www.denvergov.org/jobs/PublicNoticesandAnnouncements/CareerServiceAuthorityRuleRevisions/tabid/433593/Default.aspx>

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
EMAIL: Leon.Duran@denvergov.org

AND

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND

Opposing parties or their representatives, if any.

CERTIFICATE OF SERVICE

I certify that I delivered a correct copy of this DECISION on April 23, 2010, to the following, in the manner indicated:

Ms. Kerrie Cady, 7058 West Frost Place, Littleton, CO 80128	(via U.S. mail);
Michael O'Malley, Esq., Michaelomalley@hotmail.com	(via email);
Ms. Kathy Hand, Kathy@legalnavigators.net	(via email);
City Attorney's Office at Dlefiling.litigation@denvergov.org	(via email);
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