

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

Appeal No. 133-02

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEAL OF:

JAMES COLLINS, Appellant,

Agency: DENVER DEPARTMENT OF HUMAN SERVICES, and
THE CITY AND COUNTY OF DENVER, a municipal corporation.

INTRODUCTION

This matter comes before the Career Service Board on appeal by James Collins filed July 11, 2002. Appellant challenges the Denver Department of Human Services' decision to suspend him for one week without pay for various alleged violations of Career Service rules.

For purposes of this Decision, Mr. Collins shall hereinafter be referred to as "Appellant." The Denver Department of Human Services shall be referred to as "DDHS" or "the Agency." The rules of the Career Service shall be referenced as "CSR" with a corresponding numerical citation.

A hearing in this matter was held before Personnel Hearing Officer Joanna Lee Kaye ("hearing officer") on October 7, 2002 at the Career Service Authority Offices. The Agency was represented by Assistant City Attorney Niels Loechell, with the Agency's Mail Room Supervisor, Veronica Abraham, present for the entirety of the proceedings as advisory representative for the Agency. Appellant was present and was represented by Mark Schwane, Esq. of the CFPE.

The Agency called the following witnesses: Ms. Abraham, former Child Support Enforcement Director Peter Dever (by telephone), and Program Case Manager Tammy Larimore on rebuttal.

Appellant testified on his own behalf and called Ms. Abraham, and Mail Room employees Leve Montoya, Julie San Nicolas, and Kenneth Gray.

The Agency's Exhibits 2 and 3 were offered and admitted. Exhibit 3 was admitted over Appellant's objection that it contained attachments for which there was no foundation because the Agency considered those documents in its decision to suspend Appellant. The parties

stipulated to the admission of Appellant's Exhibits A through E, I, J, Z, CC, DD, EE, JJ and KK. No additional exhibits were offered or admitted.

PRELIMINARY MATTERS

1. **The Hearing Officer's Jurisdiction**

The hearing officer finds she has jurisdiction to hear this case as a suspension pursuant to CSR Rule 19-10 b), as follows in relevant part:

Section 19-10 Actions Subject to Appeal

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.

- ...b) Actions of appointing authority: Any action of an appointing authority resulting in... suspension... which results in an alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

Jurisdiction over Appellant's suspension was not disputed by either party to this case.

2. **Burden of proof**

The City Charter, C5.25(4) and CSR 2-104(b)(4) require the hearing officer to determine the facts of the case "*de novo*." This means that she is mandated to make independent determinations of the facts and resolution of factual disputes. Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975.)

In civil administrative proceedings such as this one, the level of proof required for a party to prove its case is a *preponderance of the evidence*. See, 13-25-127, C.R.S (2001). In other words, to be meritorious, the party bearing the burden must demonstrate that the assertions it makes in support of its claims are more likely true than not.

It has been previously established that the Agency responsible for disciplining a Career Service employee affirmatively bears the initial burden of establishing, by a preponderance of the evidence, that it had *just cause* for the disciplinary action. See, In the Matter of the Appeal of Vernon Brunzetti, Appeal No. 160-00 (Hearing Officer Bruce A. Plotkin, 12/8/00). The severity of discipline must also be reasonably related to the nature of the offense in question. See, In the Matter of Leamon Taplan, Appeal No. 35-99 (Hearing Officer Michael L. Bieda, 11/22/99).

ISSUES

1. Whether the Agency has shown by a preponderance of the evidence that Appellant engaged in the alleged acts.

2. If so, whether the acts constitute violations of CSR rules, giving the Agency just cause to discipline Appellant.
3. If so, whether Appellant's one-week suspension without pay is reasonably related to the seriousness of the offenses in question.

FINDINGS OF FACT

1. Appellant has been an employee of the Agency for approximately ten years. For the past nine years, he has been the Print Room Operator. His primary duties comprise all printing functions for the Agency such as forms, booklets, brochures and other official documents. Appellant has a lengthy list of commendations for excellent service to the Agency. (See, Exhibits A-E, I, J, Z, CC, DD, EE, and JJ.) Appellant's yearly performance evaluations are typically "Exceeds Expectations."
2. Appellant is supervised by Mail Room Supervisor Veronica Abraham. Appellant has no supervisory duties.
3. Individuals without official identification badges who go into the DDHS building sign a log titled "DDHS Access Badge" (see, Exhibit 3). Presumably the individual's name and time are entered and the individual is given an access badge when they enter, and the individual drops the badge off and their log-out time is entered when they leave. It is unclear from the evidence where the security desk is located, whether it is constantly monitored and if so by whom, or whether individuals may enter and exit any other access points in the building.
4. The Agency employs individuals who are TANF recipients in the "Work Pool Program." These employees must work in the work pool as a condition of receiving their benefits. Each work pool employee is required to work 151 hours a month and is required to submit Monthly Contact Reports indicating as much. Work pool employees typically work six months to one year in the Work Pool Program, presumably before moving on to permanent employment in the workforce. The Work Pool Program is coordinated by Peggy Gonzales.
5. Leve Montoya has supervised approximately six work pool employees during his 3 ½ years in the mail room. He testified there are no procedures for supervising work pool employees other than signing them in and out. He typically makes them sign a hand-made sign-in sheet he keeps by the desk where he works. (Exhibit KK) Mr. Montoya testified that when he is not there, co-worker Julie San Nicolas "sometimes" monitors the sign-in sheet. He testified that if neither of them is there the work pool employee is "supposed to go to (Ms. Abraham)."
6. Both Mr. Montoya and Ms. San Nicolas report to Ms. Abraham as their supervisor.
7. In approximately November of 2001, Ms. Gonzales coordinated with Ms. Abraham to place a work pool employee, James Sanchez, in a position in the mail room under the supervision of Mr. Montoya.

8. Mr. Montoya testified that while Mr. Sanchez began working for Mr. Montoya full-time, at some point Appellant borrowed him a couple of times. Thereafter, Mr. Montoya testified, "all of a sudden he disappeared." Mr. Montoya believed that Appellant asked Ms. Abraham to place Mr. Sanchez in the copy room. Mr. Montoya testified he did not actually hear Ms. Abraham telling Mr. Sanchez to work with Appellant, but believes this was the case because it was the only way he could imagine the reassignment occurring.
9. Exhibit KK includes Mr. Montoya's sign-in sheets from November of 2001 to March of 2002. It contains several partial entries indicating no sign-out times, including during the months of November and December. While Mr. Sanchez's name appears regularly in the entries for the month of November, his name does not appear in the December entries.
10. Ms. San Nicolas testified that she recalled working with Mr. Sanchez in the mail room when he first started. Then Mr. Sanchez started helping Appellant in the print room. She testified some days he worked in both places.
11. Appellant testified that Mr. Sanchez began in the mail room. The mail room is across the hall from the print room where Appellant works. On a few occasions Appellant needed help on a special project and asked Mr. Montoya if he could "borrow" Mr. Sanchez. Mr. Sanchez liked working in the print room and eventually came to work there on a daily basis. Appellant testified that there was no formal process for "borrowing" work pool employees, but that he believed Ms. Abraham knew he was doing this because she was there supervising the mail room and saw Mr. Sanchez working with Appellant. Appellant testified that from the time Mr. Sanchez first worked with Appellant to the time he left was about three months.
12. Ms. Abraham testified she did not know Mr. Sanchez had gone to work with Appellant in the print room, and that she did not authorize this re-assignment.
13. Mr. Montoya testified that he signed monthly contact sheets for work pool employees when they worked for him. He testified that the Monthly Contact Sheets he uses are different than the one bearing Appellant's signature (*see*, Exhibit 3.) He testified that the work pool employee takes the Monthly Contact Sheet and presumably gives it to their TANF case manager. He testified he did not sign for Mr. Sanchez while Mr. Sanchez "was under Appellant" and was not aware of his comings and goings. He testified Appellant "would have to sign for (Mr. Sanchez)."
14. Ms. San Nicolas testified that she signs the Monthly Contact Sheets when Mr. Montoya is not there to do it. She testified she knows how to do this from training she received approximately three years previously by the former Work Pool Program coordinator. She testified she signs them if she knows they are accurate; otherwise she refers the employee to Ms. Abraham or Mr. Montoya. Ms. San Nicholas testified that if work pool employees are "borrowed from the mail room" she would not know who would sign off on them because she was not overseeing them at that point.

15. Appellant testified he has worked with work pool employees on a few occasions in the last three years when he needed help on special projects, and over the years has worked with approximately 15-20 work pool employees altogether. He testified that the management of the work pool employees has been very lax for several years, including before Ms. Abraham became the supervisor. He testified he has never received instructions about how to handle work pool employees or process their paperwork. He testified that he has signed Monthly Contact Sheets over the past few years for all of the work pool employees he has been in contact with and has never been told he was not supposed to be doing this.¹ He testified that "practically anybody" (referring to employees) would sign the Monthly Contact Sheets. Appellant testified that he assumed his signature represented verification that the work pool employee had been working with Appellant. He testified that work pool employees tend to have erratic schedules because of other program obligations.
16. Appellant signed several Monthly Contact Sheets on the "Supervisor" signature line for Mr. Sanchez, including the one for the month of December, 2001 in Exhibit 3. He testified he was not aware this was a problem until he later received the letter from the Agency announcing its intent to pursue disciplinary action against him.
17. Mr. Sanchez' Monthly Contact Sheet for the month of December indicates that he worked a total of 157 hours (Exhibit 3). It is undisputed that Mr. Sanchez received a \$200.00 bonus to which he would not have been entitled if he had not worked the hours he claimed to have worked in the December Monthly Contact Sheet.
18. Appellant testified he came to be friends with Mr. Sanchez, but in the work setting only. Appellant did not socialize with Mr. Sanchez outside the workplace.
19. Kenneth Gray is a stockroom clerk for the Agency, which is a non-supervisory position. He has been with DDHS for fifteen years. He is responsible for ordering office supplies and maintaining the copy machines. He testified he has had work pool employees assigned to work with him in the past. He testified that the work pool employees presented him with Monthly Contact Sheets and he signed them. He testified he had no training on procedures for handling work pool employees, and was not told not to sign the Monthly Contact Sheets until some time in early 2002.
20. The Monthly Contact Sheet is structured as to clearly suggest it is to be filled out by the work pool employee. The bottom of the form states: "I hereby certify that the hours recorded are true and correctly reported." This statement does not have its own signature line, but instead appears below the signature lines of both the employee and the supervisor. (See, Exhibit 3.)
21. Appellant did not monitor Mr. Sanchez' attendance hours. Appellant testified he never read the Monthly Contact Sheet carefully, and never actually noticed the certification statement at the bottom of the form. When asked who was responsible for assuring the hours on the Monthly Contact Sheet are accurate, he testified he believed the case manager was responsible for this.

¹ While Appellant did not specifically state as much, the hearing officer presumes that Appellant signed on the "Supervisor" signature line for these others as he did for Mr. Sanchez (see, Exhibit 3).

22. Ms. Gonzales told Appellant that Mr. Sanchez and his wife both altered their timesheets in the past, and both admitted to doing this. Appellant is unsure when the fraud happened but is certain it was before December of 2001. Ms. Gonzales came into the print room periodically to check on Mr. Sanchez and therefore clearly knew he was working in the print room. Ms. Gonzales never gave Appellant any special instructions on how to monitor Mr. Sanchez' time.
23. At some point during approximately January of 2002, Mr. Sanchez stopped coming to work regularly. Appellant called his case manager, Tammy Larimore, on January 23, 2002 to express concerns about Mr. Sanchez' absenteeism. Ms. Larimore testified that Appellant told her something to the effect that he just wanted to give her the heads up that Mr. Sanchez was no longer coming in like he had been, and believed he might have been drinking on one occasion. He told Ms. Larimore during this conversation that the Monthly Contact Sheet he signed for Mr. Sanchez for December of 2001 was not accurate. He said something to the effect that he wasn't interested in pursuing the matter further. Ms. Larimore was left with the feeling that Appellant wanted to cut Mr. Sanchez a break, but thought he was letting her know this out of professional courtesy. Appellant did not tell any of the supervisors about Mr. Sanchez' failure to show up for work.
24. Child Support Enforcement Director Peter Dever testified that the Agency's Budget Director, Jay Morein, provided him with a packet of documents which included several sign-in sheets from the Agency's security desk, and a Monthly Contact Sheet for the month of December, 2001 with Mr. Sanchez' name on it evidently prepared by Mr. Sanchez (*see*, Exhibit 3). Mr. Dever did not testify as to when he received this packet. He testified the sign-in sheets had already been redacted when he received them, and he never saw the unredacted originals. Mr. Dever testified he does not know who redacted them. He does not know how Mr. Morein came into possession of the documents. Mr. Morein did not testify.
25. The unredacted portions of the log sheets suggest Mr. Sanchez worked approximately 85 hours during the month of December, 2001 (*See*, Exhibit 3).
26. Apparently Mr. Morein had a letter prepared on May 28, 2002, notifying Appellant that disciplinary action was being contemplated against him ("Contemplation Letter," Exhibit 3). It is unclear who prepared this letter, but it bears what purports to be Mr. Morein's signature. The Contemplation Letter indicates that its attachments included Mr. Sanchez' December, 2001 Monthly Contact Sheet, and the DDHS log-in sheets for December of 2001, which excluded sheets for the days of December 4, 12, 17, 18, 20, 21 and 26 (*see*, Exhibit 3). The Contemplation letter set a predisciplinary meeting for June 13, 2002. The meeting time was later changed to June 26, 2002.
27. Present at the meeting on June 26, 2002 were Ms. Abraham, Mr. Morein and Appellant, with Mr. Dever present and conducting the meeting. During the predisciplinary meeting, Appellant told the supervisors he felt he "wasn't totally at fault," that he had "not been trained" and "did not understand the significance" of what he was signing. Appellant testified he said he "wasn't totally at fault" during the predisciplinary meeting because "I

didn't feel it was my fault this kid cheated on his time sheet." He testified that the supervisors already knew Mr. Sanchez had falsified his timesheet and should have watched him more closely. He admitted he was at fault for signing the item in ignorance, but pointed out that this was standard practice.

28. Mr. Dever testified that following the predisciplinary meeting, he elected to suspend Appellant for one week because he "frankly did not believe" Appellant. Mr. Dever testified that Appellant's "partial admission" combined with Mr. Dever's disbelief in Appellant's assertions of ignorance led him to conclude a one-week suspension was appropriate.
29. On July 8, 2002 Mr. Dever sent Appellant a "Notification of Disciplinary Action" (Exhibit 2) informing Appellant that the Agency had determined to issue him a one-week suspension without pay from July 22 through July 26, 2002.
30. Appellant timely filed an appeal of his suspension on July 11, 2002.

DISCUSSION

1. Rules the Agency alleges Appellant violated.

a. Alleged CSR violations.

The Agency posits that Appellant's conduct constitutes violations of the following CSR rules (*see*, Exhibit 2):

Section 16-50 Discipline and Termination

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 of willful neglect of duty.

Section 16-51 Causes for Progressive Discipline

A. The following unacceptable behavior or performance may be cause for progressive discipline....

- ...2) Failure to meet established standards of performance including either qualitative or quantitative standards.
- ...6) Carelessness in performance of duties and responsibilities.

2. Analysis of the evidence.

a. The log sheets.

While (Appellant) testified that the sign-in log is kept at the security guard's desk, no witnesses offered any additional testimony about how the sign-in sheets are monitored, who monitors them, exactly where they are located in relation to the building entrances, how consistently they are used, or whether there is any honor system in place if the security guard or other individual responsible for them is not present. The Agency offered no testimony about any consequences to Mr. Sanchez for his alleged failure to work the hours. In addition, there are apparently several pages missing for days on which Mr. Sanchez claimed he worked. Yet there was no testimony by the person who redacted names and omitted pages to explain the methodology for doing so. Basically, the Agency has not shown that the sign-in logs are sufficiently reliable to establish by a preponderance of the evidence that Mr. Sanchez didn't work all the hours he said he did.

In the absence of this evidence, the only remaining evidence concerning whether Mr. Sanchez worked all the hours or not, is Appellant's own call to Ms. Larimore to report that Mr. Sanchez was not working all the hours he claimed in the December, 2001 Monthly Contact Sheet. However, this act must be examined for what it suggests about Appellant's state of mind.

b. Appellant's report of the inaccuracy of the Monthly Contact Sheet.

At the predisciplinary meeting, Appellant said something to the effect that the incident was "not totally my fault." The Agency felt this "partial admission" was evidence that he knew he was participating in an illicit act at the time he signed the timesheets. The Agency's arguments imply that Appellant signed the Monthly Contact Sheet knowing that Mr. Sanchez had not worked the hours so that he would receive the bonus because they were friends. The hearing officer is unpersuaded that this was the case for several reasons.

First, Appellant called Ms. Larimore on January 23, 2002 and told her that the December timesheet he had signed was incorrect. This means Appellant either engaged in an act of self-sabotage by deliberately falsifying Ms. Sanchez' Monthly Contact Sheet and then reporting the fraud, or he truly did not know his signature was supposed to represent that *he* had monitored Mr. Sanchez' hours and was verifying they were accurate. It is inconsistent and simply unlikely that Appellant would call someone to report Mr. Sanchez' failure to work the hours he'd claimed on the Monthly Contact Sheet if he had thought he had done anything wrong by signing it. Appellant's report to Ms. Larimore clearly supports his contention that he thought he was simply that he was the individual with whom the employee had been working, and that he did not know that signing the form represented that he verified the accuracy of the hours.

The preponderance of evidence on the contrary tends to support Appellant's contention that he believed keeping track of hours was the responsibility of the case manager. This is more likely than not why Appellant called Ms. Larimore to give her the "heads up." Appellant's comments about not wanting to "take it any further" were clearly motivated by Appellant feeling bad about reporting Mr. Sanchez, but knowing he had to report the situation nonetheless. It was

apparent from the testimony of these events that Appellant felt it was *she* who might get into trouble if the error were discovered, and the heads up he was trying to give her was for her own good. The hearing officer finds Appellant's statement that he didn't want to "take it any further" more likely than not referred to his disinterest in getting either her or Mr. Sanchez into any trouble, not himself as the Agency implies.

The hearing officer is persuaded by the totality of Appellant's actions and consistent, credible statements that he did not intend to falsify the form. She is further persuaded by Appellant's explanation that when he said he was not "totally at fault," he meant that "I didn't feel it was my fault this kid cheated on his time sheet." The hearing officer concludes that Appellant did not know he was not supposed to sign the Monthly Contact Sheet, and that he did not know that his signature was supposed to represent the signatory's verification that the hours claimed were accurate.

The Agency asserts that the certification at the bottom of the form negates Appellant's claim that he did not know his signature represented his verification of the hours indicated. The hearing officer is unpersuaded. The entire form is clearly addressed to the employee whose hours it purportedly represents. This sentence appears by neither the employee's signature line nor the supervisor's, but instead is at the bottom of the form in isolation. Reference to the first person "I" in the certification line clearly addresses only one person. It is not unreasonable that a person without any training on the subject presumed, as Appellant asserts, that the "I" to whom the certification line is directed is the person responsible for filling out the entire form: the employee. If the supervisor were to be held responsible or included as a participant in the certification line as the Agency argues, then it should begin with "We," not "I," or should appear next to the supervisor's signature line.

When considering the totality of circumstances, particularly Appellant's report to Ms. Larimore, the hearing officer finds that Appellant's "partial admission" during the predisciplinary meeting was very likely nothing more than him acknowledging that in hindsight he realized he'd been taken advantage of, and probably should have figured all this out.

Furthermore, the Agency has clearly had a hand in the state of affairs concerning the signing of the Monthly Contact Reports. The hearing officer presumes somebody, perhaps Mr. Sanchez' case manager or the program coordinator, was reviewing these Monthly Contact Sheets. Ms. Gonzales even knew Mr. Sanchez had previously defrauded the program and checked on Mr. Sanchez in the print room periodically to see if he was there. Yet Appellant was never told he wasn't supposed to be signing the Monthly Contact Sheets, even though he signed several of them, presumably over a long period of time. The hearing officer is perplexed why this activity went on for such a long time period without being detected if it was so clear to everybody that only certain individuals were authorized to sign these items.

The evidence tends to suggest that, on the contrary, this was not clear to everybody. Appellant presented ample evidence tending to support his claim that the entire work pool employee system was very lax, and that signing the Monthly Contact Sheets was a generally accepted practice among employees. Mr. Montoya testified he never reported that Mr. Sanchez was not presenting his Monthly Contact Sheets to him because Mr. Sanchez was working with

Appellant, and Mr. Montoya therefore thought Appellant was supposed to take care of it. Similarly, Ms. San Nicholas testified that when work pool employees are "borrowed" from the mail room she presumes somebody else is accountable for them. Mr. Gray, who is not in a supervisory position, testified that he too signed Monthly Contact Sheets for work pool employees working with him, until he was told to stop doing so earlier this year, likely as a result of this case.

Ms. Abraham testified that Mr. Sanchez' transfer should have been coordinated through her and Ms. Gonzales, but she did not explain why she never noticed Mr. Sanchez had stopped working in the mail room and had begun working with Appellant in the print room, and why her employees testified to the process of "borrowing" work pool employees as though it were a generally accepted practice. Ms. Gonzales even knew Mr. Sanchez had falsified his timesheets in the past, yet the Agency allowed Mr. Sanchez' supervision to fall to Appellant by default, apparently without anyone in the supervisory chain noticing, and therefore without any instructions from Ms. Gonzales or anyone else on how to monitor this employee's comings and goings closely.

The Agency's own assertion is that supervising Mr. Sanchez and signing his timesheets were not supposed to be Appellant's responsibility, yet nobody else was handling this responsibility either. The hearing officer is perplexed why, even after learning of Mr. Sanchez' past illicit alteration of his Monthly Contact Sheets, *nobody* in his supervisory chain was keeping track of his hours or whereabouts. If the Agency had accounted for Mr. Sanchez' activity, Appellant would not have been caught in the middle like he was. It is not unreasonable for a person in Appellant's shoes to presume, as he did, that if he was supposed to be doing something differently than he had been doing, somebody in charge would have told him about it by that point. It is apparent to the hearing officer that there was a culture created by management's inaction that led Appellant and others to believe they were supposed to be doing things this way. Yet Appellant appears to be the only one being held accountable for a series of oversights by several individuals.

In the absence of any established standards for the Agency employees in dealing with work pool employees, the hearing officer concludes that the totality of evidence does not support a claim that Appellant failed to meet established standards of performance in violation of CSR 16-51 A. 2).

The Agency's most serious charge against Appellant is "gross negligence or willful neglect of duty" in violation of CSR 16-50 A. 1). "Gross negligence" and "willful neglect" are not defined anywhere in the CSR rules. The hearing officer must therefore look elsewhere for guidance.

In In the Matter of Terri Garrett McCarley, Appeals Nos. 395-01, 25-02, and 84-02 (Decision entered 7/3/02) Hearing Officer Robin R. Rossenfeld addressed CSR 16-50 A. 1 violations. Her analysis is paraphrased here. "Negligence" does not require intent. "It is commonly defined as the failure to use reasonable care or failure to act in a reasonably prudent manner under the circumstances." Id., citing 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).

“Gross negligence” suggests a higher level of culpability than mere negligence. Use of the term “gross” in this context “means flagrant or beyond all allowance,” McCarley, citing 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. 438, 563 P.2d 1 (1977). Other terms which appear in Hearing Officer Rossenfeld’s analysis are “flagrant,” “shameful,”² and “immediately obvious.”³ Black’s Law Dictionary, 5th Edition (1979) defines “gross negligence” as:

The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting a legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care... Ordinary and gross negligence differ in degree of inattention, while both differ in kind from willful and intentional wrong...

“Willful neglect,” on the other hand, implies that the wrongful conduct is intentional or conscious. Black’s (5th Edition) defines it as follows:

The intentional disregard of a plain or manifest duty... Willful neglect suggests intentional, conscious, or known negligence – a knowing or intentional mistake. Puget Sound Painters v. State, 45 Wash.2d 819, 278 P.2d 302, 303.

The hearing officer has already determined that the Agency has not shown by a preponderance of the evidence that Appellant intentionally defrauded the Agency. She now further finds that in light of the mitigating circumstances of the Agency’s failure to supervise Mr. Sanchez, and Appellant’s own report of Mr. Sanchez’ absenteeism and the inaccuracy of the Monthly Time Sheet, his actions and omissions are not “flagrant,” “shameful,” “immediately obvious” or otherwise of such an “aggravated character” as to rise to the level of gross negligence either. The hearing officer therefore concludes that the totality of this evidence does not support the Agency’s charges that Appellant’s actions were in violation of 16-50 A. 1).

While it has not been shown that Appellant deliberately falsified the record, he admits he was partly at fault for failing to realize it was inappropriate for him to sign off on the time sheet. Thus, while mitigated somewhat by the culture of laxity and absence of intent, Appellant’s act clearly remains one of carelessness. He reasonably should have suspected something was amiss and inquired as to the significance of his signature, especially where he knew the hours were not correct. Therefore, the Agency’s evidence supports its remaining charge of carelessness in the performance of duties and responsibilities in violation of CSR 16-51 A. 6).

3. Severity of the discipline.

CSR 16, governing disciplinary actions, states as follows in relevant part:

² McCarley, citing Black’s Law Dictionary, 4th Ed., 1951.

³ McCarley, citing Miriam-Webster’s Collegiate Dictionary, 10th Ed., 1993

16-10 Purpose

The purpose of discipline is to correct inappropriate behavior or performance. The *type and severity of discipline depends on the gravity of the infraction*. The degree of discipline shall be *reasonably related* to the seriousness of the offense, and shall take into consideration the employee's past record. The appointing authority or designee shall impose the type and amount of discipline she/he believes is needed to correct the situation and achieve the desired behavior or performance...

(Emphasis added.)

The hearing officer must determine whether the degree of discipline is "reasonably related" to the seriousness of the offense. *See, Leamon Taplan, above*. It is a well-established principle of employment law that in determining whether the discipline is reasonably related, it must be "within the range of reasonable alternatives available to a reasonable, prudent agency administrator." *See, In the Matter of William Armbruster*, Appeal No. 377-01 (decision entered 3/22/02), *citing Adkins v. Div. of Youth Services*, 720 P.2d 626 (Colo. App. 1986). However, in determining whether the discipline is within the range of reasonable alternatives, the discipline may be found excessive where it is based on considerations that are not supported by a preponderance of the evidence. *See, e.g., Armbruster, above; In the Matter of the Appeal of Dolores Gallegos*, Appeal No. 27-01 (entered 3/21/01).

It is clear from Mr. Dever's testimony that he felt a one-week suspension without pay was justified because he believed Appellant deliberately falsified the record. However, the preponderance of the evidence in this case does not show that Appellant deliberately did this. Thus, the Agency has not proven the most serious allegation it has relied on to justify a one-week suspension.

Under CSR 16-10, *above*, discipline should be designed to correct the inappropriate behavior. It is apparent that Appellant is a stellar performer who loves his job. The hearing officer observes Appellant to be highly motivated to take the necessary steps to correct his behavior. She concludes that Appellant's carelessness should be sufficiently corrected by a written reprimand.

CONCLUSIONS OF LAW

1. The Agency has demonstrated by a preponderance of evidence that Appellant engaged in
 - a) Carelessness in the performance of duties and responsibilities in violation of CSR 16-51 A. 6);
2. The Agency has failed to demonstrate by a preponderance of the evidence that Appellant engaged in:
 - a) Gross negligence or willful neglect of duty in violation of CSR 16-50 A. 1).

- b) Failure to meet established standards of performance in violation of 16-51 A. 2).
3. The Agency has demonstrated just cause for disciplining Appellant by a preponderance of the evidence.
4. In light of the totality of evidence in this case, the Agency's decision to issue Appellant a one-week suspension was based on the unfounded allegation that Appellant was consciously complicit in defrauding the Agency, and therefore is not reasonably related to the seriousness of the offense.

DECISION AND ORDER

Based on the Findings and Conclusions set forth above, the Director's decision to issue discipline Appellant shall be MODIFIED as follows:

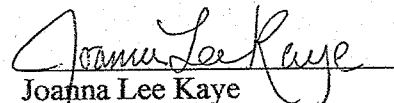
The letter documenting the one-week suspension should be removed from all files and replaced with a written reprimand, in which the following items have been eliminated:

- a) references to Appellant's signature as "certifying" the hours on the December, 2001 Monthly Contact Sheet were correct;
- b) the CSR violations that have not been shown by a preponderance of the evidence, as set forth above under paragraph 2 of the "Conclusions" section.

Appellant shall receive back-pay for the one-week suspension period as soon as is practicable for the entities responsible for generating Appellant's payroll, and shall have any benefits, to which he would otherwise have been entitled if he had not been suspended, restored in their original form.

This case is hereby DISMISSED.

Dated this 18th day of October, 2002.


Joanna Lee Kaye
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 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** by depositing same in the U.S. mail, postage prepaid, this 18th day of October, 2002 addressed to:

Mark A. Schwane
Attorney at Law
CFPE
1580 Logan St. Suite 310
Denver, CO 80203

James Collins
1792 S. Alcott St.
Denver, CO 80219

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** by depositing same in the interoffice mail, this 18th day of October, 2002, addressed to:

Niels Loechell
Assistant City Attorney
Denver Department of Human Services

City Attorney's Office
Employment Law Section

Diana Smith
Denver Department of Human Services

Charlotte A. Smith