

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

Appeal No. 73-02

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEAL OF:

DENNIS FRESQUEZ, Appellant,

Agency: DENVER HEALTH AND HOSPITAL AUTHORITY.

INTRODUCTION

This matter comes before the Career Service Board on appeal by Dennis Fresquez filed April 10, 2002. Appellant challenges the Denver Health and Hospital Authority's decision to terminate Appellant for excessive absenteeism, for alleged violations of Executive Order 112 prohibiting violence in the workplace, and for various related Career Service Rule violations.

For purposes of this Decision, Mr. Fresquez shall hereinafter be referred to as "Appellant." Denver Health and Hospital Authority shall be referred to as "Denver Health" 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 June 27, 2002 at the Career Service Authority Offices.¹ The Agency was represented by Mark B. Wiletsky, Esq., with Denver Health's Director of Patient Services, Nancy Klock, present for the entirety of the proceedings and serving as advisory representative. Appellant was present and was represented by Michael O'Malley, Esq.

Denver Health called the following witnesses: Ms. Klock, Commercial Insurance Collections Manager Aleina Perry, and Patient Accounts Supervisor Mary Alice Ward, in its case in chief. It called Patient Accounts Supervisor Jorge Luis Chavez on rebuttal.

Appellant testified on his own behalf, and called fellow employees Myrtle Jean Davis and Carla Padilla as witnesses.

¹ The parties mutually requested leave to file the closing arguments in writing. The record was therefore held open until July 11, 2002 and both parties timely filed written closings on that date.

The parties stipulated to the admission of Agency Exhibits 1 through 6, and Appellant's Exhibit A. Agency Exhibits 7 and 8 were offered and admitted without objection during the course of the hearing as rebuttal evidence.

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 dismissal 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 dismissal... which results in an alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

Appellant elected to retain his Career Service status when Denver Health took contractual responsibility for administering the hospital, as was permitted under that contract. He is therefore a Career Service employee. Jurisdiction over Appellant's termination was not disputed by either party to this case.²

2. Burden of proof

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*. 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.

² In a prior case involving the application of Denver Health's attendance regulations, the hearing officer reviewed the Amendatory Personnel Services Agreement effective March 30, 1998 (on record with the Denver County Clerk), and took adjudicatory notice of that document. The Agreement shifts the supervision of employees who retain CSA status to Denver Health, and makes them subject to its regulations. Furthermore, CSR 16-51 A. 5) provides for the application of such regulations by making the failure to observe departmental regulations a violation punishable by disciplinary action under the CSR rules. The hearing officer therefore has jurisdiction over PP #4-122 and Denver Health has the authority to apply that regulation to Appellant. See, In the Matter of the Appeal of Tillie M. Martinez, Appeal No. 52-02 (decision entered 5/14/02).

It has been previously established that the Agency responsible for terminating 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 Agency must also demonstrate that the severity of discipline is 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 or other controlling authority, giving the Agency just cause to discipline Appellant.
3. If so, whether Appellant's termination is reasonably related to the seriousness of the offenses in question.

FINDINGS OF FACT

1. Appellant is a fifteen-year veteran in hospital records and collections. For the first two years of his tenure Appellant worked in Medical Records. He was then promoted to a position in Accounts Receivable, posting cash payments. In July of 1990 he was again promoted to the position of biller / collector. At some point in the last few years the unit was split, separating billings from collections. Appellant served as acting supervisor on two separate occasions during this reorganization. He applied for the permanent position but was not chosen. He ended up returning to the collections unit in a non-supervisory position, where he stayed until his termination. His regular work schedule was 8:00 a.m. to 4:30 p.m. Monday through Friday.
2. The record indicates Appellant previously received the following disciplinary actions (*see*, Exhibit 2, pp. 5, 15-22):
 - a) On May 14, 2001 Appellant was placed on investigatory leave and eventually was given a written reprimand on June 6, 2001 for calling an unauthorized meeting, disrupting the work of five employees. Appellant apparently did not grieve or appeal this written reprimand.
 - b) Appellant was suspended for three weeks by a disciplinary action of June 30, 2000 for gross negligence / willful neglect of duty, refusing and failure to comply with a supervisor's orders, threatening, fighting with or abusing other employees, harassment / discrimination, and failure to maintain satisfactory working relationships. This action arose from a series of incidents in which Appellant engaged in various inappropriate, aggressive or confrontational behaviors with other employees and Appellant's supervisor (including "thumping" papers laying in front of her on her desk while making comments about them), and making disrespectful

comments to and about the supervisor and other employees. That suspension in turn took into consideration a series of prior verbal warnings, some of which date back more than five years before the date of Appellant's termination. Those verbal warnings arose from similar types of behavior as the suspension action, and one was for excessive absences during the year 1998. Appellant apparently did not appeal this suspension.

- c) Appellant was given a verbal warning on January 5, 1998 for hanging up on another staff member.³
3. At some point in approximately 2000, Denver Health offered to pay for anger management classes if Appellant would take them. Appellant took this offer and began attending the classes in January 2001. Appellant testified that after the classes were over he continued in the therapy independently for a year because he found it so beneficial. Appellant testified that one of the tools he learned in anger management is that when a confrontation begins, one should simply walk away from the confrontation rather than remaining engaged and participating in its escalation.
 4. During his testimony at hearing Appellant noted that his tone is sometimes mistaken by others as more aggressive than he intends it to be.
 5. At the time of his separation, Appellant's direct supervisor was Patient Accounts Supervisor Mary Alice Ward. Prior to Ms. Ward's appointment in October of 2001, Appellant was acting supervisor in collections. Ms. Ward's supervisor is Commercial Insurance Collections Manager Aleina Perry. Prior to Ms. Perry's hire in February of 2002, Anthony Charles served in this position and supervised Appellant while the Patient Accounts Supervisor position was vacant or was occupied by Appellant. Ms. Perry in turn reports to the Director of Patient Services, Nancy Klock.
 6. The billing unit prepares and sends initial claim forms. The collections unit follows up on unpaid claims. The units employ computer software in the preparation of both billing and collections actions. Once primary insurance options have been exhausted, an "exhaust" letter is generated. The bill is entered in the "SSI" computer system that feeds all the patient data "UB 92," a form generated to seek secondary payment sources. Appellant testified that determining these cases and generating exhaust letters is one of his duties. He testified it takes approximately twenty-four hours (overnight) for validation of this process to occur and the hard-copy UB 92 to be produced; however, the information is stored in SSI's memory and can be re-accessed during the validation period. The exhaust letter is then forwarded to the billing unit for processing.
 7. Denver Health provides services to the underserved and uninsured citizens of Denver. Because of this, the hospital relies heavily on its reimbursements. Diligence in billings and collections is therefore critical to the continued functioning of the hospital. Each employee is assigned a certain alphabetical portion of the patient population, and that portion of billing or collections languishes when the employee is not there. In addition, when the employee is not

³ Under CSR 16-40 C, verbal warnings may not be grieved or appealed.

there, any issues that arise regarding the patients assigned to that employee must be handled by others who are already handling a heavy workload. Attendance is therefore critical to the continued smooth operation of the hospital. For these reasons, Denver Health has a very strict attendance policy, Denver Health Employee Principles and Practices # 4-122 (*eff.* 1/15/98; *rev.* 4/25/99; hereafter PP #4-122; Exhibit 2, pp. 8-10). This regulation only permits six occurrences of absence during any rolling twelve-month period.⁴ An "occurrence" of absence can include multiple consecutive days of absence up to five days. However, employees only have twelve days of sick leave and a limited amount of vacation leave per year to draw from in their leave banks. Absence of over one quarter of a shift is considered absence for the day.⁵ (*See*, PP #4-122; Exhibit 2, pp. 8-10.)

8. Denver Health employs a "Request for Paid Time Off form ("PTO request;" *see*, Exhibit 7). Witnesses for Denver Health testified that this form must be submitted at least twenty-four hours in advance for an absence to be considered "excused."⁶ They testified that this is to provide an opportunity to arrange for temporary coverage for the employee's absence.
9. Appellant testified that right around the time he was removed from the acting supervisor position for the second time in approximately December of 2000, he began to obsess about work, was confused about being assigned acting supervisor on multiple occasions intermingled with various disciplinary actions, and was uncertain whether he was in the Agency's good or bad graces. Appellant testified he began to experience depression, sleeplessness, knots in the stomach, vomiting, and the like. He testified that this was one of the main reasons he began to experience excessive absences. He testified that in addition to his own health problems, he began to visit his granddaughter, who had been diagnosed with leukemia, in Lincoln, Nebraska.
10. Appellant testified that in the fall of 2001 he found out about the Family Medical Leave Act ("FMLA") after missing work to see his granddaughter. His supervisor, who was then Anthony Charles, told him about FMLA when he returned. Appellant expressed interest in FMLA relief. Appellant testified that his original FMLA application request was based on both his own medical condition as well as his granddaughter's. Mr. Charles forwarded the request to Benefits Administration for processing on or around September 26, 2001. Apparently, Benefits sent Appellant a letter on September 28, 2001 requesting he supply them with the required medical certification (*see*, Exhibit 4, p. 3). Appellant claims he never received this request, and he eventually went to Benefits to check on his application sometime in October or November. He testified they told him they had sent the document to him, but there was a "problem" with Appellant's name or address. Presumably this problem prevented the document from arriving at Appellant's home. Appellant testified that Benefits told him his response was already late and gave him a five-day extension to get the required

⁴ A "rolling twelve-month period" is the period between any date during a given year and the same date of the subsequent year.

⁵ While the specific amount of leave an employee earns per year was not specifically addressed, the hearing officer presumes it is an amount similar to sick leave.

⁶ This is consistent with PP #4-122, Practice 4, which states that "prearranged" absences are exempted from consideration as "occurrences" of absence for purposes of the rule.

medical statement, but that since the granddaughter's doctor was in Lincoln, Appellant felt trying to get the information within five days was hopeless.⁷ Appellant testified that he abandoned his attempts to complete the application process at that time.

11. The FMLA letter presumably dated September 28, 2001 requesting Appellant's additional medical certification (*see*, Exhibit 4, p. 3) was not introduced as an exhibit. A denial letter was sent to Appellant on November 16, 2001 (Exhibit 4, p. 3) at the address which appears on Appellant's appeal. Appellant verified that this address is correct. This letter references Appellant's original FMLA application and the certification request sent to Appellant on September 28, but does not reference Appellant's extension request and five-day extension. It is not clear whether this letter was sent before or after he visited Benefits in person and/or whether Benefits corrected Appellant's alleged address error by this time or not, but Appellant's name is still misspelled in this letter. Appellant called no one from Benefits to testify to the nature of the address problem or whether Benefits received back any mail sent to Appellant as undeliverable. It therefore has not been shown whether the September 28, 2001 letter had the wrong address on it.
12. Director of Patient Services Nancy Klock testified that an employee can request FMLA relief, and then take leave based on FMLA at their own risk before the request is processed. She testified that leave taken in anticipation of an FMLA application that is subsequently denied becomes unexcused upon denial of the application.
13. After Mary Alice Ward became Appellant's direct supervisor on October 15, 2001, it came to her attention at some point that Appellant was frequently absent without making PTO requests in advance. When she and Mr. Charles reviewed Appellant's attendance record in approximately January of 2002, they found seventeen instances of unexcused absence within the previous eight-month period (*See*, Exhibit 2, p. 3; *cf.*, Exhibit 6).⁸ She testified Mr. Charles did the calculations for Appellant's absences up to the time of her hire, and that she did the calculations for the absences after that. Ms. Ward testified that she included in this list only the absences for which Appellant did not file PTO requests in advance. Mr. Charles then reported these absences to Ms. Klock, who instructed him to issue Appellant a verbal warning.
14. Ms. Ward asserts that she met with Appellant and gave him a verbal warning for excessive leave use on January 23, 2002. The termination letter (Exhibit 2, p. 3) indicates that she verbally warned Appellant at that time that further instances of unexcused absence may result in further disciplinary action, up to and including termination (*see*, PP #4-122, Practice 7; Exhibit 2, p. 9). Ms. Ward testified that Appellant did not deny the absences alleged in this verbal warning meeting (*see*, Exhibit 4). Appellant did not refute this contention. She testified that the documentation of the verbal warning was actually prepared by Mr. Charles (Exhibit 4).

⁷ From the time of the predisciplinary meeting to the time of the hearing, this extension period had shortened from five days to three according to Appellant's testimony. (*see*, Exhibit 8, p. 12)

⁸ While the documents show eighteen absences including December 3, 2001, Appellant apparently was at work that day according to Exhibit 6, p. 16).

15. Appellant testified he never saw this document until the day before the hearing in this matter, but apparently does not deny that management talked to him about the excessive list of leave dates. Appellant maintains that Ms. Ward never told him that requests for leave must be submitted in at least twenty-four hours in advance of the absence. He asserts he therefore did not realize that when he called in on the morning of absences to request vacation time, it counted against him as an "occurrence of unexcused absence" under PP #4-122. However, Appellant filled out PTO requests in advance on several occasions since Ms. Ward became his supervisor in October of 2001 and therefore knew of its existence at least by that time (*see*, Exhibit 7).
16. After Appellant's verbal counseling on January 23, 2002, he had two more unapproved absences:
 - a) Appellant testified that on February 11, 2002 he called the office to let them know he was running late. Appellant testified he subsequently missed the bus. He testified that he did not realize the bus schedule changed after 9:20 a.m. to run only hourly thereafter at twenty minutes past the hour. Appellant testified he did not arrive at work until 12:55 p.m., and had therefore missed over half the workday.
 - b) Appellant called in sick and was absent on March 8, 2002 for the entire day. Appellant did not testify as to the reason for his absence on this day.
17. On the morning of January 11, 2002 Appellant and another collector, Kris Valentine, were repeatedly printing documents on the same printer. Appellant argued that around 9 a.m. Ms. Valentine began taking his documents off the printer and setting them aside. He testified that by about 9:30 she had done this to his documents several times. He testified that he finally got fed up with this behavior the last time. He testified that as he stood near the printer and Ms. Valentine walked away from the printer, Appellant said to Ms. Ward (who was standing nearby), "You need to tell her not to act this way." Appellant pointed at Ms. Valentine when he said this. Ms. Ward testified that "perhaps" Appellant should have pulled her aside. She testified that she thought his tone was loud enough for others to overhear the comment, and the incident to negatively affected team morale. Denver Hospital did not call any such employees to the stand. She did not state who was nearby that might have overheard this comment, or explain how the comment might have negatively affected them. The Agency testified that Ms. Valentine later reported this incident to Human Resources as a complaint of harassment and discrimination, but that the complaint was not sustained upon investigation. Ms. Ward testified she reported this incident to Ms. Perry.
18. Appellant testified that the whole incident on January 11 lasted only a few seconds. He testified he only pointed at Ms. Valentine to indicate about whom he was talking to Ms. Ward, that Ms. Valentine had walked away and had her back to him, and that he did not raise his voice or otherwise make any aggressive gesture toward Ms. Valentine. He testified that he went to his office and returned to work, thinking nothing more of the incident until a supervisor came to question him about it and get his side of the story for investigation into the complaint of harassment Ms. Valentine had filed against him.

19. On March 4, 2002 a biller by the name of Ozinette Dennis received an exhaust letter from Appellant with a note indicating that secondary insurance was to be billed on a certain patient account, and to attach the letter to the UB 92 when it was generated the following morning. She approached her supervisor, Patient Accounts Supervisor Jorge Luis Chavez (the supervisor in charge of billings), and asked him to return the exhaust letter to Appellant. Ms. Dennis had put a note on it in which she requested Appellant to provide secondary insurance information. When Mr. Chavez asked why she did not give Appellant the claim herself, she told him that she did not get along with Appellant. Mr. Chavez then took the claim to Appellant, who was not in his office at that time. Mr. Chavez dropped the document off in Appellant's office.
20. Appellant, who had momentarily stepped away from his desk, returned to his office and found the exhaust letter had been returned to him with the note on it. Appellant testified that the claim had already been entered into the SSI system and all the information was therefore accessible to employees in the UB 92 stored there. Appellant testified that as a former biller, he knew Ms. Dennis' duties well and she should have known to retrieve the information she had requested from the UB 92 form in the SSI system (or wait for the hard copy with all the information on it the following morning).
21. Appellant testified that for over a year, Ms. Dennis has chronically returned claims to collections requesting additional information that she as a biller is supposed to verify and enter herself, saying she doesn't have time to look up the information. Appellant testified that while protocol is to report problems to one's own supervisor, he had reported this problem repeatedly to his supervisor but that nothing has changed. Therefore, this time he decided to report to her supervisor rather than his own.
22. Denver Health did not dispute that the information Ms. Dennis requested was already in the data Appellant had prepared and was accessible to Ms. Dennis. It did not dispute that what Ms. Dennis was asking Appellant to do was actually one of the duties connected with her billing responsibilities. It did not dispute that Appellant had repeatedly reported that Ms. Dennis frequently returned documents to collections inappropriately requesting additional information she was supposed to gather from the prepared data.
23. Appellant testified that he retrieved the data Ms. Dennis requested and put it on a post-it note on the exhaust letter. He then went to Mr. Chavez, and gave him the exhaust letter. Mr. Chavez testified that Appellant walked past Ms. Dennis' desk to approach him, and that Appellant "shoved" the letter at his chest when he gave Mr. Chavez the letter. Mr. Chavez testified that Appellant then said something to the effect that the information Ms. Dennis requested was already on the form, and that he wasn't sure what his billers were doing but that this was their job. Mr. Chavez testified Appellant said this in a tone that was "fairly aggressive." Mr. Chavez did not look at the document, but told Appellant he should take it to Ms. Dennis himself. Appellant then said something to the effect that she was Mr. Chavez' employee and that he should take care of this.
24. Appellant testified that Mr. Chavez then began "hollering and talking loud" with cubicles nearby and that Appellant turned to walk away to avoid engaging in an apparent brewing confrontation. Mr. Chavez testified he could not recall who raised his voice first, he or

Appellant. He testified that at that time he approached Appellant and told him they would go to Appellant's supervisor about this incident. He testified that he might have raised his own voice in an attempt to get Appellant's attention because he was walking away. Mr. Chavez testified that the reason for approaching Appellant's supervisor was to discuss both the nature of Appellant's demeanor and the substance of Appellant's request that Mr. Chavez take the document to Ms. Dennis. Mr. Chavez brought Ms. Dennis with them to Ms. Perry's office.

25. Ms. Perry testified that Appellant, Mr. Chavez and Ms. Dennis all entered her office. She testified that Appellant and Mr. Chavez were both already speaking with raised voices and apparently arguing about something. She testified she heard none of the discussion before they entered her office. Mr. Chavez told Ms. Dennis to explain what happened. She began to explain the information she had requested and Appellant said to Mr. Chavez something to the effect that "she's being illogical." Appellant testified he was referring to Ms. Dennis' requesting information that she was supposed to get and that was already on his response. Mr. Chavez told Appellant he should apologize to Ms. Dennis for making this comment, and Ms. Perry repeated this request to Appellant. Appellant refused stating that it was a fact, and that he was constitutionally entitled to express his opinion. Appellant then stood and asked to leave the meeting. Ms. Perry told him he could not leave because they were not done yet. Mr. Chavez again told Appellant to apologize to Ms. Dennis and again Appellant refused. Once again Appellant asked to be excused from the meeting and this time he was allowed to do so.
26. Ms. Perry testified that she understood the debate to surround the execution of a form but was not clear on the details. She did not know whether or not Ms. Dennis already had what she was asking for. She denied needing to know the underlying facts to determine whether Appellant's use of the term "illogical" was reasonable or not. Ms. Perry testified that she was "shocked" that Appellant had called Ms. Dennis illogical. She testified that it was clear he was in essence calling her "stupid." She testified that his tone was raised during the meeting, but that he did not "yell," raise his arms or make any other indication of being elevated. She testified that Appellant did not say anything directly to Ms. Dennis but instead directed his comments primarily at Mr. Chavez. She testified that Appellant said nothing else about Ms. Dennis.
27. All the participants testified that during the discussion Mr. Chavez' and Appellant's voices were about equally raised as they spoke with one another. Ms. Perry and Mr. Chavez testified that Mr. Chavez was raising his voice in an attempt to get control over the conversation and be heard. Mr. Chavez testified that Appellant's behavior "could be interpreted" as just raising his voice to be heard as well, but that he stood abruptly when asking to leave.
28. Appellant testified that during the discussion in Ms. Perry's office, Mr. Chavez was "standing" behind Ms. Perry's desk next to Ms. Perry and that he and Ms. Dennis were seated in front of the desk next to each other. Mr. Chavez testified he was "sitting" in a windowsill behind Ms. Perry's desk that was about table height. Appellant testified that he was perplexed how Ms. Dennis' refusal to do her job and the fact that billing functions are being pushed off on collectors somehow got turned around on him by two supervisors during this meeting. He testified that the reason he requested to be excused was because he wasn't

doing anything wrong when he said this and their reaction frustrated him. He testified that again he was trying to separate himself from the confrontation.

29. Ms. Perry reported this incident to Ms. Klock as unacceptable behavior on Appellant's part. Ms. Klock testified that this incident concerns her in part because a seemingly minor incident became escalated to the point where two employees and two supervisors had to get involved. Ms. Klock testified that based on this incident, combined with the incident of January 11, 2002 and Appellant's additional absences subsequent to the verbal warning in January 2002, she determined to pursue disciplinary action against Appellant.
30. On March 11, 2002 the Agency sent Appellant a Notice of Contemplation of Disciplinary Action ("contemplation letter") (Exhibit 3). The contemplation letter notified Appellant that Denver Health was contemplating disciplinary action for excessive absenteeism, and for instances of alleged misconduct on January 11, 2002 and March 4, 2002.
31. The predisciplinary meeting was held on March 21, 2002. Present were Appellant and his representative, Cheryl Hutchinson of AFSCME, Ms. Klock, and Chief of Business Offices Paul Hudson. Appellant was provided an opportunity to respond to the allegations at that time (*see*, Exhibit 8).
32. On April 3, 2002 the Agency issued Appellant a letter of termination. The termination letter indicates Denver Health took Appellant's prior disciplinary actions, as set forth above in paragraph 2, into consideration in its decision to terminate Appellant.
33. Appellant timely appealed this case on April 10, 2002.

DISCUSSION

1. Rules the Agency alleges Appellant violated.

The Agency posits that Appellant's absences and conduct constitute violations of the following CSR rules:

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...

- ...8) Threatening, fighting with, intimidating, or abusing employees or officers of the City and County of Denver for any reason...
- ...18) Conduct which violates and executive order which has been adopted by the Career Service Board (specifically, Executive Order 112, set forth below).

...20) Conduct not specifically identified herein may also be cause for dismissal.

Section 16-51 Causes for Progressive Discipline

A. The following unacceptable behavior or performance may be cause for progressive discipline. Under appropriate circumstances, immediate dismissal may be warranted...

...4) Failure to maintain satisfactory relationships with co-workers, other City and County employees or the public.

...5) Failure to observe departmental regulations (specifically PP #4-122, set forth below).

...11) Conduct not specifically identified herein may also be cause for progressive discipline.

Executive Order 112 sets forth as follows in relevant part:

EXECUTIVE ORDER NO. 112

...II. General Policy

...Violence, or the threat of violence, by or against any employee of the City and County of Denver is unacceptable and contrary to city policy, and will subject the perpetrator to serious disciplinary action...

...To ensure and affirm a safe, violence-free workplace, the following will not be tolerated.

A. Intimidating, threatening or hostile behaviors...

* * *

Finally, PP #4-122, which is Denver Health's rule governing leave, reads as follows in relevant part:

Principle:

Denver Health recognizes that a certain amount of absenteeism is unavoidable; however, frequent absences disrupt operations, patient care and may place an added burden on fellow employees.

Practice:

...6. Generally, six occurrences of absence within a rolling twelve month period is considered excessive and *will* result in a verbal warning; however, in some cases it may be necessary for the Corrective Action to be initiated upon a lower

number of occurrences of absences, as determined by the manager of the department. Regardless of the number of absences that is defined as excessive, each subsequent occurrence of absence results in the issuance of Employee Corrective Action, *up to and including termination*. The twelve month period begins with the first occurrence of absence, and is commonly referred to as a "rolling" twelve month period. Multiple consecutive days of absence are considered as one occurrence of absence.

- ...12. Corrective Action, *up to and including termination*, will be issued: Upon the sixth occurrence of absence, (or a lesser number as determined by the departmental manager) within the rolling twelve month period, and upon each subsequent occurrence of absence if such absences continue.

(Italics added.)

2. Unsubstantiated Allegations.

a. Alleged Violation of Executive Order 112:

Denver Health asserts that the incidents on January 11, 2002 and March 4, 2002 constitute violations of Executive Order 112, governing violence in the workplace. After reviewing all the evidence, the hearing officer is unpersuaded. She concludes that Denver Health's allegations of workplace violence are not supported by a preponderance of the evidence.

i. Incident of January 11, 2002:

On January 11, 2002 Appellant pointed his finger at a woman who had her back to him and who therefore could not see him pointing at her. He said to Ms. Ward, "you need to tell her not to act that way." Appellant did this after the woman had apparently done something many reasonable people would find irritating, and to which many might respond by suggesting to their supervisors something similar to what Appellant suggested. While saying this out in an open area where others might overhear, even assuming this had been shown, wasn't the optimal choice of circumstances to deliver the message, the hearing officer nonetheless concludes that neither the message nor the delivery constitutes "intimidating," "threatening" or "hostile" behavior rising anywhere near the level of "violence in the workplace." (See, Exhibit 2, P. 11.)

ii. Incident of March 4, 2002.

Similarly, the hearing officer is troubled that the Denver Health characterized the incident of March 4, 2002 as a violation of Executive Order 112. Based on the evidence presently before the hearing officer, Ms. Dennis was in fact behaving illogically. It was she, not Appellant, who was the first to involve Mr. Chavez by asking him to put the request on Appellant's desk that day. Mr. Chavez further testified he could not recall who had raised his voice first that day, he or Appellant. In addition, the hearing officer is unpersuaded by Denver Health's argument that two supervisors and two employees getting involved was Appellant's doing. Again, it was Ms.

Dennis who initially involved Mr. Chavez. And it was Mr. Chavez who elected to involve Ms. Perry.

Finally, the hearing officer finds Denver Health's evidence inconsistent on the reason for its objections to Appellant's behavior. The Agency asserts that it was Appellant's tone as well as his comments that prompted disciplinary action. Yet the focus of Appellant's behavior in the meeting was that he apologize to Ms. Dennis *for saying she was being illogical*. Reference to his use of the term *illogical* turned up prominently in the contemplation letter, the disciplinary action, and Denver Health's testimony, as the clear focal point of its objections to this incident.

The hearing officer found Appellant's explanation for making this statement persuasive. One employee asking another to do something that first, is not one of his duties, and second, he has already done for her, in an already overworked environment, seems illogical. Appellant's comment is not so far outside the realm of reasonable reactions to constitute a threat, intimidation or harassment sufficient to violate Executive Order 112.

The spirit of Executive Order 112 is clearly intended to deal with *violence or threats of violence*. While one might characterize Appellant's behaviors as disagreeable or question their appropriateness, to characterize incidents such as these so severely tends to dilute the magnitude of real threats of violence that constitute violations of the Order. While the hearing officer appreciates that the Agency takes seriously its duty to vigilantly protect employees from potential workplace violence, it should not abandon reasonable judgment in the process. For the foregoing reasons, the hearing officer concludes that Appellant's behavior did not violate Executive Order 112 or CSR 16-50 A. 18 (which both reference similar language pertaining to workplace violence). Consequently, there has also been no violation of CSR 16-50 A. 8 (referencing violation of an Executive Order).

Finally, the hearing officer concludes that Appellant was not removed from the meeting on March 4, 2002, but rather deliberately acted to remove himself so as to *avoid* further conflict. The supervisors' testimony clearly supported Appellant's version of this event.

For these reasons, the portions of the termination letter referencing the above allegations are not supported and must be amended accordingly.

b. Hearsay allegations included in the January 11, 2002 incident.

A portion of the Agency's complaint concerning the January 11, 2002 incident was justified by vague, uncorroborated hearsay allegations that Appellant's comment was "overheard by others" and "employee morale was affected." Although the rules of evidence excluding hearsay are relaxed in administrative proceedings, "such relaxation must not be extended so as to disregard due process of law and fundamental rights." 117th Associates v. Board of Equalization, 811 P.2d 461 (Colo. App. 1991); citing Puncec v. City & County of Denver, 28 Colo. App. 542, 475 P.2d 359 (1970). By analogy, Colorado laws governing administrative proceedings provide that "'every party . . . shall have the right . . . to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts.' Cross-examination is a right rather than a mere privilege. . . ." Equalization, above; applying Industrial Claims Appeal Office v. Flower Stop Marketing Corp., 782 P.2d 13 (Colo. 1989). The standard

to be applied is whether the evidence "possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs." *See, e.g., Colorado Department of Revenue v. Kirke*, 743 P.2d 16 (Colo. 1987).

Allegations cannot be proved by a preponderance of evidence where uncorroborated hearsay is the sole basis for the fact in issue. *Allen v. Industrial Comm.*, 36 Colo. App. 330 (Colo. App. 1975). Therefore, where vague allegations are supported only by hearsay and are uncorroborated by other evidence, the Agency has failed to sustain its burden and these allegations will be disregarded. *See, In the Matter of the Appeal of Martha Douglas*, Appeal No. 317-01 (decision entered 7/12/02), *applying Flower Stop, above*.

Ms. Valentine reportedly lodged a complaint with Human Resources against Appellant presumably because of the printer incident, but neither Ms. Valentine nor the complaint were offered to establish the exact nature of her complaint. While the hearing officer is mindful that the requirements to show a claim of harassment and discrimination are different than those to show workplace violence (or a violation of the related CSR rules) on Appellant's part, according to Denver Health her allegations against Appellant were not sustained in the investigation. Therefore, any impact to Ms. Valentine is hearsay and has not been shown.

Similarly, while Ms. Ward testified that others were nearby and close enough to overhear his comment sufficiently to negatively impact morale, Denver Health offered neither those employees nor any other evidence of such negative impact. Once again, these allegations are hearsay and have not been shown.

3. Substantiated allegations.

a. Failure to maintain satisfactory working relationships.

The hearing officer observed Appellant to naturally employ a somewhat expressive, assertive tone of voice despite the nature of the conversation. While Appellant's point is not lost on the hearing officer, he certainly has been put on notice through multiple prior disciplinary actions that many different people have perceived his manner as rude, abrupt and inappropriate in the past. He has been held accountable multiple times to adjust his behavior accordingly. Telling Ms. Ward what she should tell the other employee how to supervise in an open area, rather than pulling her aside and explaining his frustration in confidence, was fairly clearly inappropriate. Similarly, "shoving" the document into Mr. Chavez' chest was rude and inspired by anger and frustration. The hearing officer is further persuaded that Appellant did raise his voice at times during these incidents. Raising one's voice in the workplace is never an appropriate response to frustration, no matter who does it first or how understandable one's frustration is.

For these reasons, the hearing officer concludes Denver Health has demonstrated by a preponderance of the evidence that Appellant violated CSR 16-51 A. 4. This is clearly the more appropriate charge for behaviors such as those Appellant exhibited during the incidents of January 11, 2002 and March 4, 2002.

b. Leave abuse.

Denver Health argues that attendance in billings and collections units is critical to the continued functioning of the hospital. It posits that Appellant's absences were clearly in excess of Denver Health's leave policy, and that the regulations permit for termination upon the occurrence of any incidents following the verbal warning under PP # 4-122 Practice 6 (*above*).

Appellant responds that the rash of absences began shortly after he was removed from the position of acting supervisor for his unit for the second time, and also learned his granddaughter has leukemia. He posits that Ms. Ward never told him he had to file a PTO Request every time he wanted to take a vacation or sick day without it counting against him, and that he did not realize his morning call-in's requesting vacation leave were counting against him. He argues that he first learned of FMLA in the Fall of 2001, and that his application was denied because Benefits failed to send his documents to the right address, and failed to give him sufficient time to cure his application once he learned of this.

A review of the following portions of PP #4-122 suggests that Denver Health's application of the regulation to Appellant's absences have been justified under the regulation. First, Practice 3 of PP #4-122 states that "failure to report to work as scheduled...without prior arrangement [is] considered absence, regardless of cause." In looking to what is meant by "prior arrangement," it is apparent that the regulation refers to a PTO request for leave time, unless the absence is "exempted" from being counted for some other reason. Practice 4 sets out the following exemptions from consideration as "occurrences of absence":

Only those absences from scheduled time prearranged in accordance with the Denver Health PTO Principle and Practice, absences due to a work-related injury, absences due to bereavement, jury duty and absences due to an *approved* leave of absence *are exempt from consideration as occurrences of absence.*

(Emphasis added.) Notably, calling in sick or requesting a vacation day on the day of the absence do not appear in this list of exemptions. Therefore, PP #4-122 makes no exception for legitimate personal or family illnesses, whether vacation leave or sick leave is requested. This conclusion is underscored by Practice 1, which states: "...Contacting the immediate supervisor or designee (prior to the beginning of a shift) does not "excuse" any absence."⁹ (Parenthetical added.)

The hearing officer rejects Appellant's arguments that he didn't know he was abusing his leave in violation of PP #4-122 for the following reasons. She has analyzed Appellant's attendance records from the week of June 3, 2001 through the week of March 3, 2002, (Exhibit 6, pp. 2-24) and has ascertained the following. The period in question comprises 40 workweeks, totaling 1,600 hours assuming a 40-hour workweek. In addition to the absences complained of

⁹ The hearing officer has previously found that while the rule is unclear as to the difference between an "excused" and an "unexcused" absence called in on the morning of its occurrence is, such an absence either way is distinct from an "approved" absence. The Agency can therefore count such periodic called-in absences against an employee under PP #4-122. See, Tillie Martinez, *above*.

as "unexcused" in the Agency's action, Appellant had dozens of additional part- or full-day absences that the Agency did not count as "occurrences of absence" and therefore were apparently excused. Appellant's total absent time left him 1,205 hours in attendance during these 40 weeks, leaving an average of approximately 31 hours attendance per week. Assuming eight paid holidays during this period (or 64 hours of holiday leave), Appellant's ordinary attendance expectations (with no time off) = $1,600 - 64 = 1,536$ hours. Appellant was present at work for only 1,205 of these hours, or 78.5% of his scheduled work time, even taking into account holiday time. In other words, Appellant's total requests for various types of absence comprise approximately 21.5% of his regularly scheduled hours, the equivalent of more than one full day per work week.

The hearing officer is similarly unpersuaded by Appellant's argument that he did not know call-in requests for vacation time in lieu of sick time on the day of the absence counted against him. First, while Appellant argues that he did not realize a PTO request was required to exempt such absences, he nonetheless filed four such PTO requests after October of 2001 (Exhibit 7). One is left to wonder what Appellant thought he was achieving by doing this if not exempting those absences.

In addition, of the nineteen total absences in the disciplinary letter, according to the attendance records (Exhibit 6), Appellant apparently requested sick leave on eleven of those instances, some of which were multiple-day absences. Therefore, even disregarding Appellant's vacation leave requests, within this 40-week period alone Appellant was over both the twelve-day sick-leave limit as well as the limit of six unexcused absences for an entire year. Moreover, after the beginning of September, Appellant had apparently used up both his sick and annual leave banks, since frequently the leave was without pay until the end of the year (*see*, Exhibit 6, pp. 9-17). Therefore, Appellant's pay must have been docked. The hearing officer finds it unreasonable for Appellant to argue that he did not know this was happening and why.

The hearing officer is further unpersuaded by Appellant's explanation for being over half a day late on February 11, 2002. Appellant verified that he lives in the 700 block of Osceola Street in Denver, Colorado 80204. This is within approximately three miles (about thirty-two blocks) due west of Denver Health located at 777 Bannock Street, also in Denver (*see*, Exhibit 4, p. 3). Even accounting for the extra travel time required for bus transportation, the hearing officer finds that Appellant's explanation of missing the 9:20 a.m. bus does not justify arriving at work over three hours later, at almost 1:00 in the afternoon.

Finally, the hearing officer is not persuaded by Appellant's FMLA arguments. First, it is unclear whether the hearing officer has any jurisdiction over such an issue. Second, assuming she does, Appellant has proffered insufficient evidence and no authority to show whether any of his absences would likely have been exempted under the qualifying requirements of FMLA.

Moreover, the hearing officer is not persuaded by Appellant's explanation for abandoning his application process. He asserts that five days was not enough time to get medical certification from his granddaughter's doctor in Lincoln, Nebraska. Yet Appellant testified that one of the main causes of absence, and one of the bases for his request for FMLA coverage, was his own depression and attendant symptoms arising from the Agency's inconsistent treatment and his loss of supervisory status not once, but twice. While the hearing officer found this testimony

persuasive, Appellant did not offer any explanation for not trying to justify the FMLA request based on his own illness, presuming reasonably that his doctor is somewhere closer than Lincoln.

Furthermore, Appellant never supplied a copy of any letter from Benefits bearing the wrong address to substantiate his assertion that he never received it. His claims of the length of the extension Benefits gave him have been inconsistent.¹⁰ Finally, even assuming Appellant had cleared all the above hurdles, he did not make clear which of his absences he would have requested be counted under FMLA. Therefore, the hearing officer would have no idea how many of Appellant's absences to deduct from the nineteen counted against him.

Given the totality of this evidence, the hearing officer concludes that Denver Health has proven Appellant's nineteen absences constitute a violation of PP #4-122, giving it just cause to issue a disciplinary action.

4. Severity of the Discipline.

The elimination of charges that Appellant violated Executive Order 112, and consequently CSR 16-50 A. 8) and 18), raises the question whether Appellant's termination would still be reasonably related to the severity of the remaining offenses in the absence of these charges. Appellant has argued that termination is too severe in light of Appellant's long employ and the mitigating circumstances surrounding this case.

Denver Health has shown by a preponderance of the evidence that Appellant has violated CSR 16-51 A. 4) and 5), and PP 34-122. In addition, it considered multiple prior instances of lesser discipline for factually similar infractions.

Progressive discipline is preferred but is not a requirement under the CSR rules. CSR 16-20, Progressive Discipline, states in relevant part:

Wherever practicable, discipline shall be progressive. However, any measure or level of discipline may be used in any given situation as appropriate. This rule should not be interpreted to mean that progressive discipline *must* be taken before an employee may be dismissed.

(Emphasis added.)

Therefore, the test is not whether the discipline is the next available step in the scheme of progressive discipline. The test is 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 to be reasonably related, the discipline need only 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).* In determining the reasonableness of the discipline, the hearing officer will not substitute her judgment for that of the Agency unless

¹⁰ *See, Finding of Fact No. 10 and footnote 7, above.*

the discipline is clearly excessive, or 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).

While Ms. Klock testified that her decision was based on these multiple charges, the critical nature of attendance by hospital employees has led the hearing officer to uphold termination based on PP #4-122 violations alone in prior cases. *See, In the Matter of the Appeal of Tillie M. Martinez*, Appeal No. 52-02 (decision entered 5/14/02). In that case, Denver Health explained that attendance by staff responsible for patient charts is critical to patient care because the charts are used regularly in treatment. Similarly, the reason for the Agency's strict attendance standards in this case is also clear. Denver Health offered credible, uncontroverted testimony that attendance by collections employees is critical to the assurance of the greatest possible amount of reimbursement which, because of Denver Health's service to the underserved and uninsured communities, is essential to the continued functioning of the hospital.

In addition, PP #4-122, Practice 7 states that after the verbal warning is issued, "Each subsequent occurrence of absence results in the issuance of Employee Corrective Action, *up to and including termination.*"¹¹ (Emphasis added; *see*, Exhibit 2, p. 9.) Appellant was warned during his verbal warning that subsequent violations might lead to termination. Notwithstanding this warning, he was absent without excuse twice thereafter.

Finally, the Agency has shown two violations of CSR 16-51 A. 4). The Agency's consideration of prior instances of disciplinary action was appropriate, given that they were similar in nature to the substantiated charges in this case.

Under the totality of circumstances of this case, termination is not clearly excessive, is based on considerations that are supported by a preponderance of the evidence, and is within the range of reasonable alternatives available to Denver Health.

CONCLUSIONS OF LAW

1. The Agency has demonstrated by a preponderance of the evidence that Appellant has violated CSR 16-51 A. 4), "Failure to maintain satisfactory relationships with co-workers, other City and County employees or the public," 16-51 A. 5), "Failure to observe departmental regulations," and PP # 4-122, governing attendance.
2. The Agency has failed to demonstrate by a preponderance of the evidence that Appellant has violated CSR 16-50 A. 8), "Threatening, fighting with, intimidating, or abusing employees or officers of the City and County of Denver for any reason..." CSR 16-50 A. 18), "Conduct which violates and executive order which has been adopted by the Career Service Board," and Executive Order 112, prohibiting violence in the workplace.
3. By showing the violations set forth in Conclusion 1 above, the Agency demonstrated just cause for disciplining Appellant.

¹¹ *See also, Practice 12; Exhibit 2, p. 10.*

4. In light of the totality of the circumstances, Appellant's termination is reasonably related to the seriousness of the substantiated offenses in question.

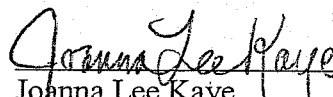
DECISION AND ORDER

Based on the Findings and Conclusions set forth above, the Agency's decision to issue the written reprimands to Appellant is **AFFIRMED** and **MODIFIED** as follows. The letter of termination shall be amended in all existing files to delete references to the following:

- 1) Violations of Executive Order 112, and CSR 16-15 A. subsections 8) and 18).
- 2) Appellant being "excused from the meeting (on March 4, 2002) at that point in order to avoid further escalation of the situation."
- 3) Appellant's absence on December 3, 2001.

This case is hereby DISMISSED

Dated this 23rd day of July, 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 23rd day of July, 2002 addressed to:

Michael O'Malley, Esq.
1444 Stuart St.
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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 23rd day of July, 2002, addressed to:

City Attorney's Office
Employment Law Section

Dr. Patricia Gabow
Denver Health and Hospital Authority

Office of General Counsel
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Virginia Zavala