

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

Appeal No. 215-00

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

Appellant: **AKILAH GRAHAM,**

And

Agency: **MAYOR'S OFFICE OF CONTRACT COMPLIANCE,** and the City and County of Denver, a municipal corporation.

NATURE OF APPEAL

Ms. Akilah Graham, ("Appellant") a Contract Compliance Analyst, appeals her grievance of a written reprimand by the Mayor's Office of Contract Compliance, ("Agency"). The reprimand alleges two incidents, one involving an alleged unauthorized absence from work on May 17th 2000, and the other involving an alleged abuse of leave time on August 4, 2000.

The Appellant does not deny the occurrence of the incidents, but contends that given all of the surrounding circumstances, she did not violate any Career Service Rules. She further contends that the written reprimand is unfair and she is requesting that it be reversed and that it be removed from her personnel file. The Appellant also alleged discrimination based upon race and sex, however, due to her failure to raise any discrimination claim during the grievance process, the Hearing Officer dismissed the discrimination claim.

INTRODUCTION

For purposes of these Findings and Order, the rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation. A hearing on this appeal was held on December 11, 2000, before Michael L. Bieda, Hearing Officer for the Career Service Board. Appellant was present, and was represented by her attorney, Ms. Karen Larsen, Esq. The Agency and City were represented by Assistant City Attorney Mindy Wright, Esq., with Ms. Sharon Hill serving as the advisory witness on behalf of the Agency and City.

The Agency and City called Ms. Sharon Hill, Supervisor, and Mr. Dante James, Executive Director of the Agency, as witnesses. The Appellant, Ms. Akilah Graham testified on her own behalf. The Appellant also called Mr. Paul Nesby and Ms. Dondrea Haley as witnesses. Exhibits 2-5 and Exhibit G were offered and admitted into evidence and considered in this decision.

ISSUES ON APPEAL

Whether the agency proved by a preponderance of the evidence that the Appellant violated CSR § 16-50 (13) Unauthorized absence from work; §§16-51 (3) Abuse of sick leave; (5) Failure to observe departmental regulations and (10) Failure to comply with the instructions of an authorized supervisor.

If so, whether the agency had just cause to discipline the appellant, and whether the disciplinary action taken by the agency, namely a written reprimand, was reasonably related to the seriousness of the offenses, considering all of the circumstances.

JURISDICTION

The alleged incident regarding the failure to return from a trade show occurred on May 17, 2000. The second alleged incident regarding leave to replace her driver's license occurred on August 4, 2000.

After an investigation by the agency, the agency notified the appellant in writing that as a result of the alleged incidents, it was giving her a revised written reprimand dated September 8, 2000. The letter of reprimand includes a certificate of mailing dated September 13, 2000. On September 22 the Appellant timely filed her first step grievance with her immediate supervisor, objecting to the reprimand. On September 30 she timely filed her second step grievance with the Agency head or designee. She then filed this appeal on October 6, 2000. The record does not disclose whether Appellant received any response to her grievances. Since the discipline is less than a suspension or dismissal, a direct appeal is not permitted under Career Service Rules (See CSR §19-10 (b)). The Appellant is required to first file a grievance, as she did here.

Neither party contests the jurisdiction of the Hearing Officer to affirm, reverse or modify the disciplinary action of the Agency, pursuant to Career Service Rules. Based upon these facts the Hearing Officer finds that this appeal has been timely filed, and that under CSR §19-27, the Hearing Officer has jurisdiction and authority to affirm, reverse or modify the actions of the agency giving rise to this proceeding.

FINDINGS OF FACT

I.

The Appellant was employed with the Agency during all relevant times as a Contract Compliance Analyst. Her position includes a variety of duties involving marketing. One of her duties is to attend trade shows at various locations to represent the Agency in the recruitment of private contractors to participate in the Agency's programs for minority contractors. These programs primarily involve recruiting concessionaires for the Denver International Airport (DIA). This aspect of her job requires her to drive to various locations in either her own private motor vehicle or one furnished by the city. Appellant's office is actually located at the Denver International Airport. The trade shows are in various locations around the Denver Metro area, such as downtown, Aurora, Lakewood, Arvada and surrounding areas.

The Appellant attended a trade show on May 17th as part of her normal duties. The show was located somewhere on 84th and Wadsworth in the northwest part of the Denver Metro area. Appellant testified that it was in Arvada. The show started at 8:30 in the morning. At about 2:00 or 2:30 in the afternoon, the show was over, and according to the Appellant, she called in to her office to check messages, to check in, and to find out if anyone was looking for her. She spoke to Ms. Dondrea Haley the receptionist, and advised her that she would not be coming back to the office due to the lateness of the day. She then asked to speak to her supervisor, Ms. Sharon Hill. Ms. Haley corroborates this testimony, except that Haley remembers the call being later in the day, about 3:00 p.m. The Appellant did not speak directly to Ms. Hill, but left a message on voice-mail. There is no evidence that Ms. Hill received the message that Appellant did not intend to return to the office that afternoon.

Appellant testified that her past practice in this situation was not to return to the office. Ms. Haley testified that Appellant submitted her schedule in advance to Ms. Hill, and that Ms. Hill would advise Haley who in turn was to advise Appellant if she was to return to the office after an event that ran into the afternoon. Haley further testified that based upon past practices, she believed that the Appellant, as an analyst, had discretion to determine if she needed to return. There is no evidence that Appellant was instructed to return to the office on the day in question.

Ms. Hill testified that the Appellant is an "exempt employee" which means as a professional she is not compensated for overtime. Instead, Ms. Hill confirmed that as Appellant's supervisor, she could, in her discretion, allow "Comp Time" to the Appellant to compensate for overtime. Ms. Hill confirmed that she did in fact give the Appellant time off from time to time, but that she expected the Appellant to call and report in. Hill denies that this time off constituted "comp time". The Appellant testified that on average her

position required her to work after hours once or twice per month. She also indicated that she was required to work weekends about once per month.

On the day in question, the Appellant did not return to the office after the trade show. According to her the reasons for this were several. She indicated that logistically, by the time she returned to the office at this time of day, it would be time to turn around and go home.¹ Appellant also testified that she had occasionally in the past done work at home for the remaining workday, rather than driving back to the office. Appellant testified that on the day in question she went home and worked on a Career Service supplemental employment application for another position within City Government. She indicated that she completed the application and faxed it in. She testified that such work was permitted during work hours as a matter of custom and practice within the Agency. This was not refuted by the Agency.

Finally, the Appellant also testified that as an exempt employee, in the past she was allowed to use the time away from the office as "comp time".

Ms. Hill testified that she had sent an electronic mail message (e-mail) dated January 14, 2000, that she thought advised her employees as to the expected procedure for events scheduled away from the office such as the trade show in question [Exhibit 5]. The e-mail is addressed to: "(Contract Compliance Group)". It is unclear as to whether this included the Appellant. Appellant's name does not appear on the e-mail. The Appellant denies having ever received the email. The text of the e-mail is particularly relevant:

Hey Gang!!!!

Effective immediately when luncheons or other events are scheduled away from DIA you will be expected to return to work unless there is prior approval to attend prescheduled meetings, etc. There will be some situations, I'm sure, that this won't be necessary, so I'll just have to rely on judgment.

Therefore, those of you who plan to attend Stan's luncheon will be expected to return to DIA.

It would probably be good time management to schedule meetings appointments etc. around such events to avoid non-productive time.

¹ The Hearing Officer takes judicial notice that DIA is located some 25 to 30 miles or more northeast of the City of Denver. It takes at least 45 minutes to an hour or more to get there from downtown, depending on traffic and road conditions.

Any questions or concerns just let me know.

THANKS!!!

Mr. Nesby, another employee supervised by Ms. Hill, testified that he was unaware of any standard Agency written practice or policy on the issue of returning to the office after a trades show. He admitted that his practice was to discuss it with his supervisor ahead of time as to whether he was returning to the office or not. He testified that he did not remember receiving the e-mail from Ms. Hill on this subject. His name is also not on the e-mail and it is unclear from the evidence as to whether he is included in the "(Contract Compliance Group)". Ms. Hill supervised him since March of 1999 and therefore was his supervisor at the time the above e-mail was authored.

On or about May 19th the Appellant was verbally reprimanded for the May 17th incident and was told that she would not receive further discipline if there were no further disciplinary violations for the next 90 days. After the second incident on August 4th involving the use of leave time to obtain a duplicate of her driver's license, Appellant was given a written reprimand for the May 17th incident, which now forms a portion of the basis of this grievance appeal.

II.

The second incident involved the Appellant's request on August 4, for leave in order to obtain a replacement for her driver's license. On that afternoon, which was a Friday, the Appellant discovered that she had either lost her purse containing her license, or that it had been stolen. After searching for the purse, she requested permission from her supervisor Ms. Hill, to leave the office to obtain a replacement license. This request was granted and the Appellant was absent from the office for approximately two hours in the afternoon.

On the following Monday Ms. Hill advised the Appellant that the permission for leave had been withdrawn, that the request did not constitute an emergency and that consequently, the Appellant had been absent without leave. She was later docked for the time, and received a written reprimand for this incident as well as the one on May 17th.

According to Ms. Hill, upon further investigation, she learned that the Appellant had actually lost her license on July 28th, approximately one week prior to the request. Ms. Hill testified that the basis of the decision to discipline the Appellant was that since the license had been lost for approximately a week, there was no "emergency" and therefore the Appellant, in essence had misrepresented her situation.

The Appellant paints a much different picture. She testified that indeed she had actually had her license first stolen on June 16th. She had it replaced on July 28th, which

was confirmed by the records supplied by the Appellant to Ms. Hill. The reason it took so long, according to the Appellant, was that she was renewing a Commercial Drivers License, ("CDL") which was about to expire, and therefore she had to have a physical exam from a physician. In fact, she had been granted leave during this period for the purpose of obtaining a physical exam.

On August 4th, at about 1:00 in the afternoon, the Appellant discovered she had lost her purse containing her newly issued driver's license. After conducting a search and making a call to the lost and found at the bus station, Appellant made calls canceling her credit cards. She then requested leave from Ms. Hill, which was granted, subject to proof on Monday that she had in fact gone to get a new license.

On Monday, the Appellant produced her new driver's license, showing an issue date of August 4. Nevertheless, upon learning that the license had previously been reported stolen on July 28th, Ms. Hill canceled the leave and issued the written reprimand.

Prior Discipline and Warnings

The Agency produced no evidence that the Appellant had been previously disciplined.

DISCUSSIONS AND CONCLUSIONS OF LAW

Applicable Rules, Executive Orders, Departmental Policies and Regulations

At the time of Appellant's discipline, the following Career Service Rules, Ordinances, Executive Orders and Departmental Policies were in effect:

§ 5-62 Employees in Career Status

An employee in career status

- 1) may be disciplined or dismissed only for cause, in accordance with Rule 16, DISCIPLINE.

* * *

§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 take into consideration the employee's past

record. The appointing authority or designee will impose the type and amount of discipline she/he believes is needed to correct the situation and achieve the desired behavior or performance.

The disciplinary action taken must be consistent with this rule. Disciplinary action may be taken for other inappropriate conduct not specifically identified in this rule.

§16-20 Progressive Discipline

- 1) In order of increasing severity, the disciplinary actions which an appointing authority or designee may take against an employee for violation of career service rules, the Charter of the City and county of Denver, or the Revised Municipal code of the City and county of Denver include:
 - a) Verbal reprimand, which must be accompanied by a notation in the supervisor's file and the agency's file on the employee;
 - b) Written reprimand, a copy of which shall be placed in the employee's personnel file kept at Career Service Authority;
 - c) Suspension without pay, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority;
 - d) Involuntary demotion, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority.
 - e) Dismissal, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority.
- 2) 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.
- 3) In those cases when the discipline deemed appropriate is suspension without pay of an overtime-exempt

employee, the suspension shall be for at least a whole workweek or multiples of whole workweeks.

§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.

* * *

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

* * *

§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. Failure to correct behavior or committing additional violations after progressive discipline has been taken may subject the employee to further discipline, up to and including dismissal from employment. It is impossible to identify within this rule all potential grounds for disciplinary action; therefore, this is not an exclusive list.

* * *

- 3) Abuse of sick leave or other types of leave, or violation of any rules relating to any forms of leave identified in **Rule 11 Leave.**

* * *

- 5) Failure to observe departmental regulations.

* * *

- 10) Failure to comply with the instructions of an authorized supervisor.

* * *

Analysis of agency evidence

The Hearing Officer has consistently ruled that in a disciplinary case, the Agency has the burden of proof by a preponderance of the evidence. It must prove that there existed just cause for the disciplinary action taken. A failure to meet that burden will result in a reversal of the disciplinary action against the Appellant.

The City Charter, C5.25 (4) and CSR §2-104 and 2-10 (b) (4) requires the Hearing Officer to determine the facts in this matter "de novo". This has been determined by the Courts to mean an independent fact-finding hearing considering evidence submitted at the *de novo* hearing and resolution of factual disputes. Turner v. Rossmiller, 35 Co. A. 329, 532 P. 2d 751 (Colo. Ct. of App., 1975).

Because discipline for the May 17th incident was conditioned upon the alleged August 4th violation, the August 4th violation will be addressed first.

Appellant had been given conditional approval of leave to obtain another driver's license. The evidence indicates it was not an uncommon occurrence to allow an employee leave to renew or replace a driver's license. In fact, there is evidence that this had occurred on at least one occasion shortly before the August 4th incident. She was to produce satisfactory evidence on Monday upon her return. Exactly what she was to produce is not clear. It was not communicated to the Appellant exactly what the conditions were. It was not communicated to the Hearing Officer exactly what the conditions were.

The Appellant, upon returning to work on Monday morning, produced her new license showing that it had been reissued on August 4th. Based upon misinformation or misunderstanding, her supervisor nevertheless determined that it was not an "emergency" and that leave should not have been granted in the first place. This placed the Appellant in the position of being absent without leave, after-the-fact.

The Agency's action in this regard is clearly arbitrary and capricious for a number

of reasons. Fundamentally it is unfair to grant an employee leave and then later withdraw permission, putting the employee in the position of a rule violation after-the-fact. Such action by the Agency may be justified under certain circumstances, such as gross misrepresentations by the employee. In this case, Appellant made no misrepresentations to her supervisor. Ms. Hill admitted during her testimony that she was confused by the entire CDL renewal process and did not understand it or how it interplayed with the initial loss of the license or its renewal. She mistakenly believed that Appellant had been without a license since July, when in fact Appellant had only discovered within the past hour that her license was missing. It was incumbent upon Hill to do a thorough investigation and to understand all of the facts if she intended to rely upon the Appellant's loss of her license as a basis for discipline.²

Likewise, Mr. James did not do his own investigation, but relied upon the misinformation provided by Ms. Hill in making his determination to discipline the Appellant.

Moreover, the Appellant is required to operate a motor vehicle in the performance of her duties. She must drive to and from the office to the various locations for the trade shows. Colorado Law requires an operator of a motor vehicle not only to have a valid driver's license, but also to have it within their immediate possession when operating a motor vehicle within the State of Colorado.

Colorado Revised Statutes

42-2-101. Licenses for drivers required.

(1) Except as otherwise provided in part 4 of this article for commercial drivers, no person shall drive any motor vehicle upon a highway in this state unless such person has been issued a currently valid driver's, minor driver's, or provisional driver's license or an instruction permit by the department under this article.

* * *

(3) No person shall drive any motor vehicle upon a highway in this state unless such person has in his or her immediate possession a current driver's or minor driver's license or an instruction permit issued by the department under this article.

² It should be noted that the "loss of the license" referred to here does not mean the loss of a driving privilege. It is referring literally to the actual license document being lost, stolen or misplaced.

The Appellant's request for leave to have the license reissued was reasonable and necessary. The initial determination by Hill to grant her leave to obtain a reissued license was also reasonable and necessary. The later decision to revoke the leave was therefore not reasonable, and was based upon a misunderstanding of the relevant facts and of Appellant's situation. As such it was arbitrary and capricious. Therefore there can be no rule violation by Appellant. No disciplinary action for this incident may be given.

Since the written reprimand for the May 17th incident was premised upon a violation on August 4th, it likewise must fail. However, the Hearing Officer has determined that it is appropriate to address the merits of the May 17th incident as well.

The past practices of the Agency was to allow the Appellant and others to not return to the office after trade shows that ran late into the afternoon off site. This policy was not unreasonable, given the fact that employees must occasionally work evenings and weekends. The Agency admits it has authority to grant "comp time". In this case the Appellant never received any previous warnings or instructions on this issue. She did in fact call in and attempt to speak to her supervisor. She was unable to do so. She did advise the receptionist that she was not going to return to the office. Appellant's reliance on past practices was not unreasonable and does not constitute misconduct or rule violation.

Nor does the e-mail by Ms. Hill change the outcome. The evidence is not persuasive that the Appellant ever received the e-mail. Her name is not on it. The evidence is not clear as to whether she is electronically included as an addressee in the "(Contract Compliance Group)". Even Mr. Nesby does not recall receiving the e-mail.

Due Process requires that if an Agency intends to discipline an employee for violation of an instruction from a supervisor, the Agency has the burden of proving that the instruction was communicated to the employee in question. The preferred method is a signed document by the employee acknowledging receipt of the instruction.

Even if the Appellant did receive the e-mail, it is insufficient on its face to support discipline for failing to comply. The first portion of the message "you will be expected to return to work unless there is prior approval to attend prescheduled meetings, etc." is clear enough. The next portion of the message, however well intentioned, is ambiguous and therefore problematic: "There will be some situations, I'm sure, that this won't be necessary, so I'll just have to rely on judgment." Whose judgment? Hers or the employees? What won't be necessary? Returning to work, or prior approval?

Given the ambiguity, Appellant, even if she received this message, cannot be disciplined for its alleged violation.

After considering all of the surrounding circumstances, the Hearing Officer agrees

with the Appellant that there was no rule violation surrounding the May 17th incident.

The Agency certainly has the authority and even the obligation to control the work time of its employees. This is a time of constant media scrutiny of all aspects of city government, especially the time that employees devote to their work. The Appellant and all employees must realize that abuses of their time may reflect adversely on management. The goal that Ms. Hill seeks to achieve, a full workday accountability from her employees is laudable. The first step is to communicate what is expected to each and every employee clearly and concisely.

It was also apparent to the Hearing Officer during the course of the hearing that a certain amount of "tension" exists between the Appellant and her supervisor, Ms. Hill. It is hoped that these two individuals will recognize that each possesses unique and significant talents and experience. Both are hard working individuals. Each is entitled to respect for that. Ms. Hill could serve very well as a "mentor" to the Appellant. Appellant could learn a great deal from Ms. Hill.

Violation of Department Regulations

The Hearing Officer concludes that the Agency has failed to demonstrate by a preponderance of the evidence that the Appellant has violated any Career Service Rules.

Justness of Discipline

Since the Agency has not met its burden of proof showing that the Appellant has violated any rules or regulations, any issues as to appropriate discipline are moot.

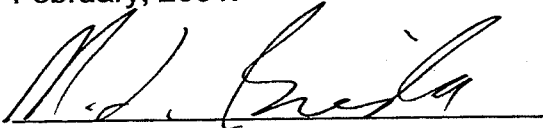
ORDER

The action of the Agency denying the appellant's grievance is REVERSED. The action of the Agency of a written reprimand of the Appellant is therefore also REVERSED, the written reprimand is ORDERED dismissed, and all references to it are ORDERED removed from all of her personnel files, including but not limited to those of the Agency and the Career Service.

Since there is no showing of any rule violations by Appellant from May 17th to August 17th, and pursuant to the verbal warning previously given to the Appellant for the incident on May 17th, it is also ORDERED that the verbal warning shall also be DISMISSED and all references to it are ORDERED removed from all of her personnel

files, including but not limited to those of the Agency and the Career Service. The Appellant is to be restored all benefits lost as a result of the discipline, including leave time.

Dated this 15 day of
February, 2001.



Michael L. Bieda
Hearing Officer for the
Career Service Board

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CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in the U.S. mail, postage prepaid, this 15th day of February, 2001, addressed to:

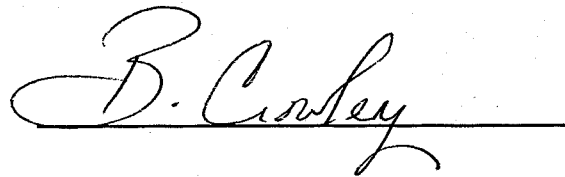
Karen Larson
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1120 Lincoln St., Suite 711
Denver, Co 80203

Akilah Graham
3530 Jackson St.
Denver, CO 80205

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** depositing same in interoffice mail, this 15th day of February 2001, addressed to:

Mindi L. Wright
Assistant City Attorney

Dante James
Mayor's Office of Contract & Compliance

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