

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

Appeal No. 161-04

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**DECISION**

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IN THE MATTER OF THE APPEAL OF:

**GIRMISH KINFE**, Appellant,

vs.

**Department of Aviation, Denver International Airport**, Agency,  
and the City and County of Denver, a municipal corporation.

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**I. INTRODUCTION**

Mr. Girmish Kinfe (the Appellant), appeals the termination of his employment, imposed November 5, 2004, by his employer, the Department of Aviation, Denver International Airport (Agency). The Appellant filed a timely appeal on November 9, 2004. A hearing concerning the appeal was conducted on March 8, 2005, by Hearings Officer Bruce A. Plotkin. Jurisdiction was not contested. The Appellant appeared *pro se*. The Agency was represented by Robert D. Nespor, Esq., Assistant City Attorney, with Mr. Chuck Smith (Smith), Director of Fleet Maintenance for the Agency, serving as the Agency's advisory witness. In addition to Smith, the Agency presented Mr. Dan G. Brown (Brown), Director of Maintenance and the Appellant's second level supervisor, as its only other witness. The Appellant testified on his own behalf, with no other witnesses

Agency exhibits 1-10 were admitted without objection. Appellant's exhibits A-C, E-G, and I were admitted without objection. D and H were admitted over objection, and E was denied as irrelevant.

**II. ISSUES**

- A. Whether the Appellant violated Career Service Rule (CSR) 16-50 A. 1), 12), 20), 16-51 A. 5), or 11) by a preponderance of the evidence.
- B. If the Appellant violated any of the above-referenced rules by a preponderance of the evidence, whether the Agency's termination of the Appellant's employment was reasonably related to the seriousness of the offense, and took into consideration the employee's past record.

### **III. FINDINGS OF FACT**

The Appellant was employed by the Agency as a Heavy Equipment Service Technician. He took approved Family Medical Leave Act leave from June 22 through September 9, 2004. On August 24, 2004, the Appellant left a voice mail message for Smith, stating he had a family emergency in Ethiopia and would be out of the country until Friday, September 26, 2004, and would return to his normal shift the following Monday, September 29, 2004. The Appellant did not return to work at the stated time. Smith called the Appellant's cell phone number every week after that, each time leaving a message on the Appellant's voice mail until the Appellant's voice mail no longer accepted messages. In each message, Smith asked the Appellant to contact the Agency, but did not receive a response. [Exhibit 7]. Smith also contacted a friend of the Appellant listed as a secondary contact, but the friend did not know how to contact the Appellant. [Smith testimony].

On October 25, 2004, Smith carried a contemplation of discipline letter to the Appellant's last-known address. At the Appellant's apartment complex, the leasing office informed Smith the Appellant moved out of apartment #502 over one year ago, and into his sister's apartment, #117, in the same complex. Smith was also informed the Appellant and his sister vacated apartment #117 approximately two months ago, which corresponded to the Appellant's August 24 message to Smith regarding the Appellant's leaving for Ethiopia. [Smith testimony and Exhibit 4]. Also on October 25, the Agency mailed its contemplation letter to the Appellant at apartment #502. The letter was returned to the Agency by the United States Postal Service (USPS) stamped "Forward Time Exp Rtn to Send." [Exhibit 3].

A pre-disciplinary conference was convened by Smith and Brown on November 3, 2004. The Appellant did not appear. Smith and Brown concluded the Appellant abandoned his job and decided, consequently, to terminate the Appellant's employment. On November 5, Smith returned with a termination letter to the leasing office at the Appellant's former residence, where the leasing agent said the Appellant had not returned and had not provided any forwarding information. The leasing agent added the Appellant's sister moved to another apartment building nearby. Smith asked the leasing agent to have the Appellant's sister contact him, but he never heard from her. [Smith testimony and Exhibit 2]. At the same time, the Agency mailed a termination notice to the Appellant on November 5, 2004, effective immediately. [Exhibit 2]. The envelope containing the termination notice was returned by the USPS on November 8, stamped "Forward Time Exp Rtn to Send". [Exhibit 2].

On November 15, 2004, the Appellant appeared at his work site for the first time since he began his FMLA leave on June 22. He brought a medical return-to-work clearance with him, but Smith informed him he had been dismissed. The Appellant filed his appeal the same day.

#### IV. ANALYSIS

##### A. CSA 16-50 A. 1) Gross neglect or willful neglect of duty.

Gross Negligence involves a higher form of culpability than mere negligence. "Gross" in this context means flagrant or beyond all allowance, or showing an utter lack of responsibility. Tennyson, CSA #140-02 (12-26-02), Gustern, CSA #128-02, (12/23/02). Gross Negligence does not require the Agency to show the Appellant intentionally acted in a wrongful manner, just that the failure to perform his work was obviously unreasonable or inappropriate. Tennyson, @ 13. Willful Neglect transcends any form of negligence and involves conscious or deliberate acts. It implies the wrongful conduct was intentional or conscious, not merely negligent. Tennyson, Gustern @18-19.

The Agency did not attempt to prove, and the Hearings Officer does not find, the Appellant's absence from work beyond September 29, was willful. However, for reasons which follow, the Appellant's unexplained and unexcused absence between September 29 and November 15, meets the definitions, above, for gross negligence.

During and following his FMLA leave, the Appellant failed to contact the Agency until he appeared at work November 15, more than two months after his FMLA leave expired on September 9, and more than one and one half months after the Appellant stated he would resume work on September 29. [Smith testimony].

In response, the Appellant cited four reasons he believed the Agency action was improper. First, his doctor told him he could not return to work until cleared medically, therefore, it would have been pointless to return earlier than he did, since he would not have been cleared to work anyway. Second, he stated he did not abandon his position, as alleged by the Agency, but attempted to stay in contact with his Agency by sending faxes from Ethiopia on three separate occasions. Third, and most importantly according to the Appellant, the Agency used an incorrect apartment number when it mailed its contemplation of discipline. The Appellant stated he provided his new apartment number to the Agency when he moved in with his sister in September 2003. [Appellant testimony, Exhibit C]. Had the Agency used the correct apartment number when it mailed its contemplation of discipline, the Appellant testified he would have received that notice, because his sister was still checking for mail sent to her former apartment, #117, and forwarding important mail to the Appellant while he was in Ethiopia. The Appellant also stated that had he received such notice, he would have returned to the U.S. immediately. [Appellant testimony]. Finally, the Appellant claimed the Agency was primarily responsible for knowing how to contact him and failed to do so prior to dismissing him.

Regarding his lack of medical clearance to return to work, the Appellant admitted he did not contact the Agency after he began his FMLA leave. He also admitted the Agency had no way to know if he was medically cleared to return to work. [Appellant testimony]. The Appellant did not establish that he was medically unable to return to

work before November 15, and some evidence indicated the contrary. [Exhibit D]. If the Appellant were unable, for medical reasons, to return to work after his stated return date of September 29, it is likely the Agency would have begun disqualification proceedings against him since all his leave was exhausted. [Smith and Brown testimony].

Regarding the Appellant's attempt to remain in contact with the Agency from Ethiopia, both Brown and Smith testified at hearing that neither the Appellant, nor anyone on his behalf, contacted the Agency from the time the Appellant began FMLA leave June 22, until his return on November 15. The Appellant produced a copy of a fax message which he said he sent from Ethiopia, [Exhibit H], but the document had no transmission information that demonstrated, by a preponderance of the evidence, that it was ever sent or received. The Appellant produced no record of either of his other two attempts to fax information to the Agency.

Regarding the Appellant's claim that the Agency sent notice to an incorrect apartment number, the Appellant proved he notified the Agency of his apartment change, from Apartment #502 to #117, on September 25, 2003. [Exhibit C]. Despite having received notice of the change, the Agency mailed both its contemplation of discipline and notice of dismissal letters to the old apartment, #502. The question to resolve here is whether, by a preponderance of the evidence, the Agency's mistake deprived the Appellant of an opportunity to be heard if notice had been mailed to the correct apartment number. See Loudermill v. Cleveland Bd. Of Edu., 470 U.S. 532 (1985).

The Career Service Rules require either hand delivery or mailing of notice to an employee's last known address. CSR 16-30 D. Smith could not find the Appellant at his former residence, thus hand delivery was not accomplished. Notice was not mailed to the Appellant's last known address, since the Agency had the Appellant's change of address notification for over one year before mailing its contemplation and termination letters. Moreover, the Appellant stated his sister was still receiving forwarded mail after she left #117, so had the Agency properly mailed its notices, his sister would have received the forwarded notice, and in turn, forwarded such notices to him in Ethiopia. [Appellant testimony]. Initially then, it appears the Agency did not comply with CSR 16-30 D.

Both the Agency's contemplation of discipline letter and its notice of dismissal were returned to the Agency by the USPS. Both envelopes were stamped with the Appellant's sister's new address and - of critical importance - notice that the forwarding order to the new address expired. The importance of the expired forwarding order is that even if the Agency had mailed notice to the correct apartment, it would not have reached the Appellant, since the Post Office intercepted the mailings before they reached the apartment complex, rendering the incorrect apartment number irrelevant. The Appellant provided no other way for the Agency to notify him. The Hearings Officer concludes the Agency's error in failing to comply with CSR 16-30 D. was harmless error.

Finally, regarding the Appellant's claim that the Agency should have known how to contact him, the Hearings Officer finds this allegation untenable. Smith attempted to find the Appellant at his last-known address on October 25, and again on November 5. Smith left numerous phone messages, and attempted to contact the Appellant through his friend. These efforts constitute ample proof of the Agency's attempts to contact the Appellant. The Appellant admitted that while he attempted to contact the Agency he did not have any proof that any of the three telefacsimiles he sent were received by the Agency. He also failed otherwise to keep the Agency apprised of his whereabouts. The Appellant is responsible for keeping the Agency informed of his contact information. CSR 16-51 A 5) (Airport Maintenance and Engineering Division Personnel Manual and Reference Guide).

For reasons stated immediately above, the Hearings Officer finds the Appellant's absence from September 29 to November 15, 2004, was unreasonable and inappropriate. It was beyond all allowance which reasonably could be permitted by the Agency, and showed an utter lack of responsibility. The Agency has thus proven the Appellant violated CSR 16-50 A. 1) by a preponderance of the evidence.

B. CSR 16-50 A. 12) Failure to report for assigned shift and failure to notify immediate supervisor of absence prior to start of shift (no show-no call) for three (3) consecutive work days. Such conduct constitutes job abandonment.

The Agency's evidence that the Appellant violated this rule is the same as that stated above. The Appellant testified in response as above: he did not intend to abandon his job, and he tried to send three faxes to the Agency while he was in Ethiopia.

The Appellant admits that, without authorization from the Agency, he did not appear at work from September 29 until November 15, 2004. The Hearings Officer finds, by a preponderance of the evidence, that the Agency did not receive the Appellant's faxes. The Hearings Officer also finds the Appellant otherwise failed to provide the Agency with his contact information between September 29 and November 15, 2005, and also finds the Agency tried in good faith to contact the Appellant before engaging in termination proceedings. Nothing more can be required from the Agency. The Hearings Officer concludes the Appellant neither appeared nor contacted his immediate supervisor before failing to appear for three consecutive days. Therefore the Appellant violated CSR 16-50 A. 12) by a preponderance of the evidence.

C. CSR 16-50 A. 20) Conduct not specifically identified herein may also be cause for dismissal.

The Agency established Appellant's conduct upon which the Hearings Officer found him in violation of CSA 16-50 A. 1) and 12), above. Therefore, this allegation is dismissed.

D. CSR 16-51 A. 5) Failure to observe departmental regulations (Airport Maintenance & Engineering Division Personnel Manual and Reference Guide (Attendance, page 4).

As a maintenance worker at Denver International Airport, the Appellant was required to comply with the above-referenced manual and guide. [Exhibit 2, Brown testimony]. In pertinent part, the manual reads

Each employee is allowed five (5) incidents (self-sickness) per year (excluding pre-approved appointments). An Incident is one (1) or more consecutive days of sick leave within the one (1) year period, January 1-December 31. In addition, sick leave for family care will not exceed eighty (80) work hours in a calendar year. Nothing in this standard is intended to or shall be implemented to abridge any rights guaranteed an employee under FMLA (See FMLA page 9)

Once an employee returning to work who has been asked to supply a “doctor’s slip” and fails to do so, will not be granted sick leave. The doctor’s slip must be received by noon of the day the employee returns to work. Failure to supply the slip in this time frame will result in Unauthorized LWOP.

The employee must report absence no later than one(1) hour prior to start of shift. To report an absence, call the **SICK CALL RECORDER** at **303-342-2840**. the sick call recorder will ask you a series of questions, which must be clearly answered. Employees absent from work must report daily.

[Exhibit 2] (emphases in the original).

From September 29 to November 15, 2004, the Appellant was absent more than five consecutive days for his shoulder injury, and absent more than 80 hours while tending to his son’s illness in Ethiopia. The Appellant responded he supplied a return-to-work approval from his doctor when he returned to work on November 15, [Appellant testimony], however he never contacted the Agency prior to or during his unauthorized sick leave, in violation of the Agency’s regulations. The Appellant therefore was in violation of CSR 16-51 A. 5) by a preponderance of the evidence.

E. CSR 16-51 A. 11) Conduct not specifically identified herein may also be cause for progressive discipline.

The Agency established Appellant’s conduct upon which the Hearings Officer found him in violation of CSA 16-50 A. 1), 12), and 16-51 A. 5), above. Therefore, this allegation is dismissed.

## **V. DEGREE OF DISCIPLINE IMPOSED**

### **Section 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.

### **CSR 16-10.**

One stated purpose of CSR 16-10 is to correct bad behavior. The Appellant had no prior discipline and was otherwise an excellent employee. [Smith and Brown testimony]. Nonetheless termination is justified in this case because the Appellant's was absent more than two months beyond the expiration of authorized leave, and was absent more than six weeks beyond the date the Appellant stated he would return. Equally important, the Appellant failed to contact the Agency during his unauthorized absence, and left no reasonable way for the Agency to contact him. For these reasons, the Hearings Officer finds the Agency's termination of the Appellant's employment was reasonably related to the seriousness of his absence, and took into consideration his past record.

## **VI. ORDER**

The Agency's termination of the Appellant's employment is AFFIRMED.

DONE this 16<sup>th</sup> day of March, 2005.

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Bruce A. Plotkin  
Hearings Officer  
Career Service Board

**CERTIFICATE OF MAILING**

I hereby certify that I have forwarded a true and correct copy of the foregoing **DECISION**, by depositing same in the U.S. mail, postage prepaid, this \_\_\_\_\_ day of March 2005, addressed to:

Mr. Girmish Kinfe  
8111 E. Yale Ave.  
#202 Unit 8  
Denver, CO 80231

I further certify that I have forwarded a true and correct copy of the foregoing **DECISION**, by depositing same in the interoffice mail, this \_\_\_\_\_ day of March, 2005, addressed to:

Robert Nespor, Esq.  
Assistant City Attorney  
Employment Law Section  
201 West Colfax Avenue Dept 1108  
Denver, CO 80202

Mr. Jim Thomas  
Department of Aviation  
Denver International Airport

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