

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

Appeal No. 146-00

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEAL OF:

Appellant: **DENISE LANFORD,**

And

Agency: Denver Health and Hospital Authority, Denver Health Medical Center.

NATURE OF APPEAL

Denise Lanford (Appellant) appeals her dismissal by the Agency from her position as a cashier. The agency dismissed Appellant due to her allegedly falsifying her time cards and those of other employees.

The Appellant denies any wrongdoing, claims the dismissal was not progressive, was too severe, was discriminatory and retaliatory. She requests that the disciplinary action be reversed and that all references to the dismissal be removed from the Appellant's personnel files, for restoration to her position including status, seniority, continuous service date, along with all benefits and back pay.

INTRODUCTION

For purposes of these Findings and Order, Denise Lanford shall be referred to as the "Appellant." The Denver Health and Hospital Authority and the Denver Health Medical Center, shall be referred to jointly as the "Agency". The City and County of Denver shall be referred to as the "City". The rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held before Michael L. Bieda, Hearing Officer for the Career Service Board. The hearing spanned several months, starting September 19, 2000. During the course of the hearing, settlement discussions were had, and in fact involved the use of another hearing officer as a mediator. When the case did not settle, the parties returned to hearing on March 7, 2001. Appellant was present throughout most of the proceedings, and was represented through most of the proceedings by her attorney of record, John Palermo, Esq. The Agency and City were represented at all times by Assistant City Attorney Richard A. Stubbs, Esq., with Ms. Peg Burnette, Assistant Chief Financial Officer, serving as the advisory witness on behalf of the Agency and City.

Appellant's counsel withdrew prior to the final day of the hearing on March 7, 2001. The Appellant also failed to appear on the final day of hearing. The Appellant had called the hearing office late in the day on March 6, 2001 and left a message on voice mail that she would not be attending the hearing the next morning. The last previous day of hearing was on December 19, 200 some two and one half months before the March 7, 2001 hearing. The hearing office was not aware of the message until the morning of March 7. At that time the Appellant was contacted by telephone and advised that the Hearing Officer would have a short phone conference in a few minutes to discuss her situation. Approximately three minutes later the hearing office attempted to call the Appellant again, at the same number, to hold a telephone conference on what was perceived to be motion for continuance. There was no answer. Appellant did not answer the phone.

Based upon this, the Hearing Officer denied the motion for continuance and proceeded to finish the hearing as scheduled. The hearing on March 7, consisted of brief rebuttal witnesses presented by the Agency. The Hearing Officer determines that their testimony was largely unnecessary as the agency had previously established a prima facie case to support its dismissal action.

The following witnesses testified during the several days of hearing: The Appellant Denise Lanford, Veronica Gurrola, Carlos Barrios, Tammy Haselhorst, Richard Varney, Debra Ann Wickersham, Peg Burnette, Adriana Chanel Flores, Jackie Martinez, Nancy Mondragon, and Saratina Finley.

The following exhibits were offered and admitted into evidence: Exhibits 1-11, 16, 17, and 18.

ISSUES ON APPEAL

Whether the agency proved by a preponderance of the evidence that the Appellant violated CSR §§ 16-50 (1) Gross negligence, (2) Theft, (3) Dishonesty, (13) unauthorized absence from work, and (20) Conduct not specifically identified. Also whether the Appellant violated CSR §§ 16-51A (1) Reporting to work late, (5) Failure to observe departmental regulations, (10) failure to comply with the instructions of supervisor, and (11) conduct not specifically identified.

If the Appellant did violate any of the above rules, whether the agency had just cause to discipline the Appellant, and whether the disciplinary action taken by the Agency, namely dismissal, was reasonably related to the seriousness of the offense, considering all of the circumstances.

JURISDICTION

The Appellant was first notified by letter of the contemplated disciplinary action and placed on Investigatory Leave effective June 1, 2000. A predisciplinary meeting was held on June 9. Appellant received her notice of dismissal on June 15, 2000.

The appellant filed her appeal of the disciplinary action with the Career Service Authority Hearing Office on June 22, 2000. Neither party contests the jurisdiction of the Hearing Officer.

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. The Hearing Officer further determines that the appellant was afforded a Pretermination Hearing as set forth by the United States Supreme Court in *Cleveland Board of Education v. Loudermill*, et al., 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 53 U.S. L.W. 4306 (1985) and required by Career Service Rules CSR §16-30.

FINDINGS OF FACT

I. BACKGROUND

1. Denise Lanford, Veronica Gurrola, and Carlos Barrios were employed at the cash office of the Denver Health Medical Center. The Appellant has attained career status and is entitled to the protections of a career employee.
2. Tammy Haselhorst was the first level supervisor and Debbie Wickersham the second level supervisor of these three employees.
3. Peg Burnette was the third level supervisor of these three employees.
4. For obvious reasons, the cash office employed certain security measures.
5. In order to open the door to the cash office, the employees were required to punch in a security code on an electronic keypad.
6. In addition, the first employee to enter the cash office in the morning was required to punch in a second security code to neutralize an alarm system.
7. If that code was punched in within a certain amount of time, the alarm would not sound.
8. However, if the code was not punched in within that amount of time, the alarm would notify a dispatch office to send a security officer to the cash office.

9. While working in the cash office, Ms. Lanford's shift began at 7:00 a.m.
10. Ms. Gurrola's shift also began at 7:00 a.m.
11. Mr. Barrios's shift began at 8:00 a.m., except on Fridays, when his shift began at 7:00 a.m.

II. CONDUCT THAT RESULTED IN RULES VIOLATIONS.

A. REASONS FOR INSTALLING THE TIME CLOCK AND INVESTIGATING THE CONDUCT OF THE THREE CASH OFFICE EMPLOYEES.

12. Prior to working at the cash office, Ms. Lanford worked at the hospital's "main cage."
13. Saratina Finley testified that, during the time Ms. Lanford worked at the "main cage," Ms. Lanford frequently arrived late for work.
14. Nevertheless, during that time period, Ms. Lanford reported on her time sheets that she had arrived on time.
15. After Ms. Lanford moved to the cash office, certain co-workers told Tammy Haselhorst that Ms. Lanford was arriving at work as much as 45 minutes late.
16. Ms. Haselhorst testified that she felt that Ms. Lanford, Ms. Gurrola, and Mr. Barrios all were not arriving at work on time.
17. Consequently, management decided to install a time clock in the cash office so that they would be able to know precisely what time Ms. Lanford, Ms. Gurrola, and Mr. Barrios arrived at work.
18. Ms. Haselhorst issued a memorandum (Exhibit 1) dated 3/16/2000, which informed the cash office employees of procedures to be utilized with respect to punching the time clock.
19. Ms. Lanford, Ms. Gurrola, and Mr. Barrios also signed the memorandum, indicating that the time clock procedures had been discussed with them and that they agreed to abide by the procedures.
20. Among the procedures set forth on the 3/16/2000 memorandum is the following: "All employees are to punch the time clock when: reporting at the beginning of his/her shift."

21. Some time after the time clock was installed, Ms. Haselhorst became suspicious that Ms. Lanford, Ms. Gurrola, and Mr. Barrios were punching in for each other.
22. Ms. Haselhorst testified to two incidents that made her suspicious.
23. The first was when Ms. Haselhorst arrived at work between 7:00 and 7:30 one morning and found that Mr. Barrios's time card was punched, showing that he had arrived at work. But he was not there. Ms. Lanford told Ms. Haselhorst that Mr. Barrios was picking up a prescription. Ms. Haselhorst, however, did not believe that story; and, even if it were true, he should not have been punched in.
24. The other incident occurred on a Friday morning, when Ms. Haselhorst arrived at work around 7:05 a.m. Ms. Lanford commented that Ms. Haselhorst was early that day. Mr. Barrios's time card was punched in even though he was not there. Ms. Lanford told Ms. Haselhorst that Mr. Barrios must have gone to a convenience store. Ms. Lanford then called Mr. Barrios on his cell phone and attempted to discretely alert him that Ms. Haselhorst had arrived at work earlier than usual. Shortly after Mr. Barrios arrived at work, he commented that someone had brought doughnuts. Ms. Lanford then said something to the effect of, "Didn't you see them when you were here earlier," in an apparent attempt to inform Mr. Barrios that he should have seen them earlier if he had already come to work. However, Ms. Haselhorst recognized that, if Mr. Barrios was the first cash office employee to come to work that day and left for the convenience store prior to the arrival of Ms. Lanford and Ms. Gurrola, he would not have seen the doughnuts since someone else obviously had brought them.
25. According to Ms. Wickersham, around May 15 or May 16, 2000, Ms. Haselhorst told her that she had become suspicious the three cash office employees were punching in for each other.
26. As a result, Ms. Haselhorst and Ms. Wickersham spoke to Ms. Burnette about that problem.
27. Ms. Haselhorst was on vacation during the period from May 19, 2000, through May 22, 2000.

B. EVENTS OF MAY 17, 2000.

28. On May 17, 2000, Ms. Wickersham arrived at work early, around 6:45 a.m.
29. She observed that no lights were on in the cash office.
30. The light in the cash office goes off automatically if no movement is detected in the office for some period of time. Ms. Burnette testified that she investigated

the time it took for the light to go off by being in the cash office for twenty to twenty five minutes without moving. During that time, the light never went off.

31. Ms. Wickersham stationed herself in the third floor conference room, where she had a clear view of the parking lot. The three employees were unaware of her presence.
32. The Hearing Officer took a field trip to the DHMC finance office, where he verified that Ms. Wickersham would have had a clear view of the parking lot.
33. Ms. Wickersham testified that she could identify the vehicles all three employees drove and knew which parking spaces they used.
34. Ms. Wickersham saw Ms. Lanford arrive at work around 7:05 a.m. and Ms. Gurrola around 7:20 a.m. Exhibit 6, page 9.
35. Later that day, Ms. Wickersham checked the time cards for both of those employees.
36. The time card for Ms. Lanford showed she arrived at 7:06 a.m. and the time card for Gurrola showed the same arrival time. Exhibit 6, page 4.
37. Ms. Lanford testified that she could not recall whether she punched in for both of them.
38. Ms. Lanford said Ms. Gurrola may have had an emergency and may have gone to a nearby convenience store.
39. But Ms. Wickersham observed that neither car was in the parking lot between 6:45 and 7:00 a.m. nor was anyone in the cash office.
40. Thus, in order for Ms. Gurrola to have come to the cash office and have left in time for the light in the office to be off by 6:45, she would have had to arrive at the cash office at least twenty minutes prior to 6:45.
41. But her time card does not indicate she was at work at 6:25; instead, it indicates she arrived at 7:06, one minute after Ms. Lanford arrived and fourteen minutes before Ms. Wickersham saw Ms. Gurrola arrive in the parking lot.
42. Ms. Gurrola testified she does not know when she arrived at work on May 17th.
43. Therefore, the "emergency" story does not make sense and is not credible.
44. The evidence indicates that, Ms. Lanford, in violation of agency rules and

procedures, punched in for Ms. Gurrola on May 17th and that Ms. Gurrola was not present at the workplace. It further indicates that this was done in order to deceive their supervisors as to the actual time Ms. Gurrola arrived at work.

C. EVENTS OF MAY 18, 2000.

45. On May 18, 2000, Ms. Wickersham again arrived at work around 6:45, observed that no one apparently was in the cash office, and stationed herself in the conference room so as to observe vehicles arriving in the parking lot. Again, the three employees were unaware of her presence.
46. Ms. Wickersham saw Ms. Gurrola arrive at work around 7:05 a.m. and Ms. Lanford around 7:30. Exhibit 6, page 9.
47. But the time cards for both employees showed an arrival time of 7:06 a.m. Exhibit 6, page 4. Ms. Lanford could not have punched in at 7:06. There was no one else to punch in Ms. Lanford at 7:06.
48. Therefore, the evidence establishes and the Hearing Officer concludes that Ms. Gurrola punched in for Ms. Lanford and Ms. Lanford was not yet present.
49. Ms. Lanford later entered 7:06 on her time sheet. Exhibit 6, page 8.
50. The entries on the time sheets are used to determine the salary to be paid to an employee for each pay period.
51. Ms. Lanford testified that the only proof she had that she was at work at 7:06 a.m. was her time card.
52. Ms. Gurrola testified that she couldn't recall when she arrived at work or punched in on May 18th.

D. INSTALLATION OF THE VIDEOCAMERA IN THE CASH OFFICE CEILING.

53. On approximately May 18, 2000, Ms. Burnette, following discussions with Ms. Haselhorst and Ms. Wickersham, decided to have a video camera installed in a ceiling vent in the cash office, immediately above the time clock. See Exhibit 9.
54. Because the camera was installed in the ceiling vent, it was not readily visible to anyone in the cash office.
55. The purpose of installing the camera was to obtain additional evidence that Ms. Lanford, Ms. Gurrola, and Mr. Barrios were punching in for each other.

E. EVENTS OF MAY 19, 2000.

56. On May 19, 2000, Ms. Wickersham arrived around 6:45 a.m. and again observed that no one was in the cash office. The three employees were unaware of her presence.
57. She saw Mr. Barrios arrive first, then Ms. Gurrola at 7:15 a.m., and Ms. Lanford around 7:30 a.m. Exhibit 6, page 9.
58. When Mr. Barrios arrived, he looked around the parking lot as if to look for Ms. Lanford's and Ms. Gurrola's cars and then rushed into the cash office.
59. Ms. Lanford's time card was punched in at 7:11 a.m. even though she was observed arriving some 19 minutes later. Exhibit 6, page 7.
60. No one else was present and therefore, Mr. Barrio must have punched Ms. Lanford's time card on May 19th.
61. Ms. Lanford entered on her time sheet for May 19, 2000, that she had arrived at 7:11 a.m. Exhibit 6, page 8.
62. Her only evidence that she was at work at 7:11 a.m. on May 19th was the time card and the testimony of Ms. Gurrola and Mr. Barrios.
63. Ms. Gurrola testified she does not know when she arrived on May 19th.
64. Mr. Barrios told two different stories, regarding the events of May 19th.
65. At first, he testified that Ms. Lanford was waiting outside the cash office when he arrived at work.
66. Later, he said Ms. Lanford and Ms. Gurrola were at work when he arrived.
67. Nevertheless, Mr. Barrios admitted punching in for all three on May 19th.
68. Mr. Barrios's statement that Ms. Lanford was waiting outside the cash office makes no sense because Ms. Wickersham observed Ms. Gurrola arrive earlier than Ms. Lanford. And, even if Ms. Lanford did not know the code to enter the cash office, Ms. Gurrola, who arrived before Ms. Lanford, would have let Ms. Lanford in.
69. Additional evidence comes from the videotape.

70. It shows one person, a male, punching three time cards in rapid succession on May 19, 2000.
71. That is consistent with Ms. Wickersham's conclusion that Mr. Barrios punched in for all three employees prior to the arrival of the other two.
72. Ms. Lanford's only evidence that she arrived at work on May 19, 2000, is the time card entry and the testimony of Ms. Gurrola and Mr. Barrios.

F. EVENTS OF MAY 22, 2000.

73. Ms. Lanford's time card for May 22, 2000 is punched in at 7:06 a.m. Exhibit 3.
74. Ms. Gurrola's time card for May 22, 2000 is punched in at 7:05 a.m. Exhibit 3.
75. The evidence established that the three employees had an agreement that whichever one of them arrived first that day evidently punched in for the others. The purpose of the agreement was to deceive their supervisors as to the actual time that they arrived at work.
76. In fact, Ms. Lanford testified that one of them punched in for the other one on May 22nd.
77. The videotape shows that one of the women punched in for both of them on the 22nd; but the identity of the one who punched the two cards is not clear from the videotape.
78. Ms. Gurrola testified that she couldn't recall anything about the events of May 22nd.
79. Ms. Gurrola testified that, if she punched in for Ms. Lanford, the reason was that Ms. Lanford was waiting outside the cash office. However, the evidence overwhelmingly establishes this to be untrue.

G. EVIDENCE THAT MS. LANFORD KNEW THE CODES TO ENTER THE CASH OFFICE AND TO TURN OFF THE ALARM.

80. As a defense, Ms. Lanford has asserted that she could not have punched in for the other two employees because she did not have access to the time clock, because she did not have the access codes.
81. Ms. Lanford initially testified she did not know whether she had the codes during the period from May 17, 2000, to May 22, 2000.

82. Ms. Lanford also testified that she did not know the access codes and would wait for Ms. Gurrola or Mr. Barrios to open the door for her.
83. In response to a question from the Hearing Officer, Ms. Lanford later testified that she knew the door code but not the alarm code.
84. Subsequently and in response to a question from counsel for the hospital, she testified that she had used the alarm code at least once because it was written on piece of paper near the alarm but that she never memorized the alarm code.
85. At another point during the hearing, she testified that she was given the codes about one week before she was dismissed.
86. Ms. Haselhorst testified that Ms. Lanford knew the door and alarm codes prior to May 17th.
87. Ms. Haselhorst testified that Ms. Lanford was given those codes in early April 2000 so that she could get into the room.
88. Ms. Haselhorst testified she saw Ms. Lanford using the door during the day without anyone's opening it for her.
89. Jackie Martinez, an unbiased third party, testified that she saw Ms. Lanford use the access code to the door.
90. Adriana Flores, another unbiased third party, testified that she saw Ms. Lanford use the door access code.
91. Ms. Flores also observed Ms. Lanford speaking with a security officer regarding the alarm. Apparently Ms. Lanford had been the first employee to enter the cash office that day and had attempted to punch in the code to shut off the alarm but had failed to do so within the required time limit.
92. On only one occasion did either Ms. Martinez or Ms. Flores ever see Ms. Lanford waiting outside the cash office for someone to open the door for her and that occurred shortly after she began working at the cash office.
93. Ms. Wickersham testified that she saw Ms. Lanford come into the office by herself.
94. Ms. Wickersham testified that she never saw Ms. Lanford waiting to go into the office.
95. Mr. Barrios said he did not know whether Ms. Lanford had the access code.

96. Exhibit 18, which is a security report, shows that Ms. Lanford called dispatch on April 14, 2000, and reported that she had set off the alarm in the cash office.
97. Time cards show that on two dates (April 26, 2000, and May 5, 2000) Ms. Lanford was the first person to enter the cash office. Exhibits 16 and 17, respectively.
98. Debbie Wickersham and Peg Burnette testified that Ms. Lanford did not indicate at the pre-disciplinary meeting that she did not know the access codes.
99. Ms. Lanford knew not to falsify the time records – everybody knows that.
100. Plus, she signed a policy, requiring employees to punch in at certain times.
101. Ms. Haselhorst testified she discussed those policies with everyone employed in the cash office including the Appellant.

III. DISCIPLINARY PROCESS.

102. On June 1, 2000, Denver Health Medical Center issued to Ms. Lanford a notice of contemplated disciplinary action. Exhibit 6.
103. Also on June 1, 2000, DHMC placed Ms. Lanford on investigatory leave. See Exhibit 5.
104. On June 9, 2000, a pre-disciplinary meeting was held. In attendance were Ms. Lanford, Joyce Montoya (Ms. Lanford's representative), Peg Burnette, and Debra Wickersham. See Exhibit 7, 3rd page.
105. On June 15, 2000, DHMC issued to Ms. Lanford a notice of dismissal. Exhibit 7.
106. On June 22, 2000, Ms. Lanford filed with the CSA hearings office an appeal of her dismissal. Exhibit 8.

IV. APPROPRIATENESS OF DISCIPLINE.

107. Ms. Lanford worked in a cash office.
108. Ms. Lanford testified she handled \$400 per day plus parking receipts.
109. Ms. Haselhorst testified that between one and fifteen million dollars flowed

through the cash office.

110. Ms. Haselhorst testified that up to \$10,000 in cash went through Ms. Lanford's hands.

V. DISCRIMINATION.

111. The three employees including Appellant, claim Ms. Wickersham did not treat them well.
112. But Ms. Burnette, rather than Ms. Wickersham, made the decision to dismiss the Appellant.
113. Ms. Burnette testified that racial discrimination played no role in her decision to dismiss Ms. Lanford.
114. Ms. Burnette testified that the reason she dismissed Ms. Lanford was that Ms. Lanford had falsified time cards and time sheets.
115. All seven cashiers, some of whom were Hispanic and some of who were not, punched a time clock.
116. Of the two persons who were hired following the firings of Ms. Lanford and Mr. Barrios and the forced resignation of Ms. Gurrola, one was Hispanic and the other a Native American.

VI. RETALIATION.

117. No one ever told Ms. Burnette anything about Ms. Haselhorst's alleged drug usage until the day Ms. Lanford and Mr. Barrios were dismissed and Ms. Gurrola was allowed to resign.
118. The first time Ms. Burnette heard about Ms. Haselhorst's alleged financial improprieties was the day Ms. Lanford was dismissed. On that day, Ms. Lanford and the other two cash office employees told Detective Ervin Haynes that Ms. Haselhorst was improperly keeping cash in her desk drawers.
119. No one told Ms. Wickersham anything about Ms. Haselhorst prior to the pre-disciplinary meeting, except for one conversation with Mr. Barrios regarding cash received from the parking lots. A security guard investigated that allegation and found it to be unsubstantiated.
120. Nancy Mondragon, Ms. Burnette's secretary, testified that Ms. Burnette has an

open door policy.

121. Ms. Mondragon testified that Ms. Gurrola and Mr. Barrios had complained to Ms. Burnette about Ms. Haselhorst's predecessor.
122. But, according to Ms. Mondragon and Ms. Burnette, the three employees never made any attempt to tell Ms. Burnette about Ms. Haselhorst's purported problems until after the disciplinary process was under way.
123. Ms. Haselhorst testified that she had no input into the decision as to whether Ms. Lanford should be fired.
124. According to Ms. Haselhorst, no one ever told her about the accusations against her.
125. The three employees also claim everyone knew about Ms. Haselhorst's financial improprieties.
126. Ms. Burnette testified she told Mr. Barrios not to gossip but never told him not to criticize other employees.
127. Ms. Burnette testified that retaliation played no role in her decision to dismiss Ms. Lanford and that decision resulted from Ms. Lanford's falsification of the time cards and time sheets.

VII. Prior Discipline and Warnings

128. Prior to the instant matter, Ms. Lanford had been disciplined on December 9, 1999, when she received a three-day suspension. Exhibit 11. This discipline was for excessive absenteeism, unauthorized absence from work, failure to report for an assigned shift, abuse of sick leave and failure to observe departmental regulations.
129. The hospital had also issued her a Corrective Action, Notice of Employee Counseling on March 1, 1999. Exhibit 10. This discipline was for excessive absenteeism.

DISCUSSION 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.

§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.

- 1) Gross negligence or willful neglect of duty.
- 2) Theft, destruction or gross neglect in the use of City and County property and or property of any agency or entity having a contract with the City and County of Denver; theft of property or materials of any other person while the employee is on duty or on City and County premises.
- 3) Dishonesty, including but not limited to: altering or falsifying official records or examinations; accepting, soliciting, or making a bribe; lying to superiors or falsifying records with respect to official duties, including work duties, disciplinary actions, or false reporting of work hours; using official position or authority for personal profit or advantage, including kickbacks; or any other act of dishonesty not specifically listed in this paragraph.

* * *

- 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.

* * *

- 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. 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.

- 1) Reporting to work after the scheduled start time of the shift.
- 5) Failure to observe departmental regulations.
- 10) Failure to comply with the instructions of an authorized supervisor.
- 11) Conduct not specifically identified herein may also be cause for progressive discipline.

At the time of appellant's alleged conduct, the following departmental policies were in effect:

The Time Clock Procedures for the Cashier department established 3/16/2000, which specified that all employees are to punch the time clock when reporting at the beginning of his/her shift, and that time sheets are to be completed based on the time

cards.

Analysis of agency evidence

The Supreme Court has established a shifting burden-of-proof scheme where race discrimination has been alleged such as the case at bar. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Construction Co. v. Waters, 438 U.S. 567 (1978); McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976); U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983); and St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). This scheme has been applied by the 10th Circuit in Hardy v. S.F. Phosphates Limited Company, 185 F. 3d 1076 (10th Cir. 1999); Equal Employment Opportunity Commission v. Flasher Company, Inc., 986 F. 2d 1312 (10th Cir. 1992).

Since the appellant in this case is not merely an "at will" employee, but rather a permanent career employee entitled to the protections of CSR § 5-62, she may not be dismissed except for cause. It is therefore the determination of the Hearing Officer that in such cases, the agency has the initial burden of proving just cause, by a preponderance of the evidence, before the employee is required to present a prima facie case for wrongful termination based upon discrimination. If the Agency fails in its initial burden, the issue of race discrimination is moot, and the agency action will be reversed. If the Agency sustains its initial burden, then and only then will the McDonnell Douglas analysis be applicable.

The Agency has established that Ms. Lanford violated CSR §16-50(A)(1) because the evidence shows she willfully violated her duty to properly report the time she arrived at work. It cannot be disputed that Ms. Lanford was under a duty to accurately report the time she arrived at work considering that her time sheets were used to calculate the money she received in salary every pay period. She also violated that duty by punching in for another employee, Veronica Gurrola, on May 17, 2000, by allowing Ms. Gurrola to punch in for her on May 18th and Mr. Barrios to punch in for her on May 19th, and by either punching in for Ms. Gurrola or having Ms. Gurrola punch in for her on May 22nd.

Ms. Lanford contends that the reason her time card was punched in at the same time as the other employees is that she did not know the security codes to enter the cash office and, therefore, was forced to wait for one of the other two to arrive. Consequently, according to her, she always started work at the same time as one of them.

But the evidence presented to the Hearing Officer undermines Ms. Lanford's explanation for why the time cards were punched in together. First, her credibility on this issue is very weak in that her story has changed several times. If this were the true reason that the time cards were punched in at the same time, certainly she would have

informed Ms. Burnette and Ms. Wickersham of that at the pre-disciplinary meeting. But she never indicated anything of the sort at the pre-disciplinary meeting or on the day she was dismissed.

Furthermore, during the CSA appeal hearing, Ms. Lanford's story was inconsistent. She first claimed that she did not know either of the codes to get into the cash office or to turn off the alarm. Then, when the hospital indicated it would have witnesses testify that they had seen Ms. Lanford enter the cash office alone, she changed her story to be that she knew the door code but that she never knew the alarm code. That would allow her to enter the cash office unaided so long as someone else had turned off the alarm first thing in the morning. But Ms. Lanford's story changed yet again to be that for a short time she had access to the alarm code because it was written on a piece of paper near the alarm but that she had never memorized the alarm. In addition, she testified at one point that she was given the codes but could not recall whether she had them during the period from May 17th to May 22nd. At another time she said she received them about a week before she was dismissed. This constant modification of her story raises questions about her credibility on this issue.

A second reason for rejecting Ms. Lanford's story that the three employees went in together and, thus, punched in at the same time – results from Debbie Wickersham's observations on May 17, 18, and 19. Ms. Wickersham was a credible witness as to her testimony regarding the events of those three days. According to Ms. Wickersham, on May 17th, Ms. Gurrola's card was punched in fourteen minutes before she arrived in the parking lot but, significantly, only one minute after Ms. Lanford arrived. For the reasons set forth in the above Findings of Fact, Ms. Lanford's story that Ms. Gurrola may have left the office that day due to an emergency is not believable.

On May 18th, Ms. Lanford's card was punched in twenty-four minutes before she arrived in the parking lot but only one-minute after Ms. Gurrola arrived. And on May 19th, Ms. Lanford's card was punched in nineteen minutes before Ms. Wickersham observed her arriving in the parking lot but after Mr. Barrios had arrived. None of this can be explained by the story that Ms. Lanford had to wait for someone else to arrive at work because she purportedly did not know the access codes.

Furthermore, if Ms. Lanford were forced to wait outside the cash office because she did not possess the security codes, on any day except Friday the time cards would have been punched in when the later of Ms. Gurrola or Ms. Lanford arrived at work. And on a Friday (when Mr. Barrios was also supposed to start work at 7:00 a.m.), if they were all going in together, the cards should have been punched in when the latest of the three arrived. But, on the days that the cards were punched in at the same time, it always occurred when the first of the three arrived at work. Thus, Ms. Wickersham's observations totally refute Ms. Lanford's explanation for why the time cards were punched in at the same time.

Third, several persons (Debbie Wickersham, Adriana Flores, and Jackie Martinez) testified that, at on several occasions prior to May 17, 2000, they saw Ms. Lanford use the access codes to enter the cash office. Ms. Flores further testified that on one occasion she saw Ms. Lanford talking with a security guard about the alarm, probably because Ms. Lanford had been the first person to enter the cash office in the morning, had attempted to shut off the alarm, but had failed to do so. This indicates Ms. Lanford was aware of the alarm code but had failed to timely punch in the correct code. Tammy Haselhorst also testified that Ms. Lanford knew the codes. This evidence refutes Appellant's contention that she could not have punched in for anyone else before they arrived.

Fourth, exhibit 18, which is a security report, indicates that Ms. Lanford was the first employee to enter the cash office April 14, 2000, and tried to shut off the alarm but failed to timely do so. This also indicates that she knew the alarm code because, if she did not know it, she likely would not have attempted to enter the cash office until another employee was present to disable the alarm. Also, exhibits 16 and 17 show that on at least two days Ms. Lanford entered the cash office prior to either of the other two employees' doing so.

Fifth, the testimony of Ms. Gurrola and Mr. Barrios was contradictory as to whether Ms. Lanford knew the codes. At times, they testified that she did not know the codes and, therefore, they had to let her into the cash office. At other times, they testified that they did not know whether she knew the codes. Furthermore, Mr. Barrios and Ms. Gurrola are not credible witnesses because they are biased against the hospital. Mr. Barrios was fired for falsifying the time records and Ms. Gurrola was allowed to resign in lieu of being fired for that same offense.

With respect to CSR §16-50(A)(2), Ms. Lanford violated that rule because she stole money from the hospital by reporting that she was at work prior to the time she actually arrived and by reporting that Ms. Gurrola was at work prior to the time Ms. Gurrola arrived. As explained above, that false reporting resulted in extra wages being paid to the employees.

Ms. Lanford violated CSR §16-50(A)(3) because she falsified her time cards and time sheets.

Ms. Lanford violated CSR §16-50(A)(13) because she left work before completion of her scheduled shift without authorization. Ms. Lanford was supposed to work an eight-hour shift. But because she reported that she commenced work earlier than she actually had on May 18th and 19th and possibly on May 22nd, she left work without putting in a full eight hours.

Ms. Lanford violated CSR §16-51(A)(1) on May 18th and May 19th because, although she reported that she was at work shortly after 7:00 a.m., which was her

scheduled start time, she actually did not come to work until about 7:30 a.m.

Ms. Lanford violated CSR §16-51(A)(5) because she did not punch in when she arrived at work on May 18th and 19th, as required by the Time Clock Procedures (Exhibit 1). She punched in for Ms. Gurrola on May 17th, and either Ms. Lanford or Ms. Gurrola punched in for the other one on May 22nd.

Ms. Lanford violated CSR §16-51(A)(10) because she did not follow the Time Clock Procedures as she was told to do by her immediate supervisor, Tammy Haselhorst.

Analysis of appellant's evidence

The Appellant has the burden of proving any allegations regarding retaliation. With respect to Ms. Lanford's claim that Ms. Haselhorst dismissed her in retaliation for attempting to blow the whistle on illegal conduct, she has failed in that burden. Appellant's allegations of retaliation are groundless. The Appellant has failed to introduce any credible evidence that would give rise to a presumption of retaliation by the Agency.

Because appellant also alleges race and color discrimination, she bears the burden of proving those allegations by a preponderance of the evidence. *McDonnell Douglas v. Green*, supra. In discrimination cases, three theories or types of proof are available to appellants. The first is direct evidence of discriminatory intent. Other types of proof, which may establish discrimination, are proof of disparate impact or proof of disparate or differential treatment. See also *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1979); and *Wright v. National Archives and Record Service*, 609 F.2d. 702 (4th Cir. 1979).

CSR §19-10 provides in pertinent part that:

The following administrative actions relating to personnel matters shall be subject to appeal:

- c) Discrimination actions: Any action of any officer or employee resulting in alleged discrimination because of race, [or] color.

It is unclear upon which type of proof Appellant relies. If Appellant premises her theory on disparate or differential treatment, the United States Supreme Court has explained the theory of disparate treatment as follows:

'Disparate treatment' such as alleged in the present case is the most easily understood form of discrimination. The employer treats

some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of difference in treatment (citation omitted). Undoubtedly, disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), n. 15.

The Supreme Court has suggested a three-part process for determining whether or not the parties have carried their respective burdens of proof or production in a case alleging disparate treatment. First, appellant must make a prima facie showing of discrimination. Second, if he does so, the agency must produce a legitimate nondiscriminatory reason for its action. Third, if the agency articulates such a reason, appellant must prove that the agency's proffered reason is, in actuality, a pretext for illegal discrimination. See Texas Department of Community Affairs, supra; McDonnell Douglas Corp., supra; Furnco Construction Co., supra; McDonald, supra; U.S. Postal Service Board of Governors, supra; and St. Mary's Honor Center, supra.

The Tenth circuit has held that when comparing the relative treatment of similarly situated minority and non-minority employees, the comparison need not be based upon identical violations of identical work rules; the violations need only be of "comparable seriousness." Elmore v. Capstan, Inc. 58 F.3d 525 (10th Cir. 1995). Under a McDonnell Douglas analysis, the employer may explain disparate treatment of different minority and non-minority employees by such things as different supervisors, or that events occurred at different times when the company's attitudes toward certain infractions were different. E.E.O.C. v. Flasher Co. Inc., supra.

"The ultimate burden of persuading the trier of fact that the defendant [in this case the agency] intentionally discriminated against the plaintiff [in this case the appellant] remains at all times with the plaintiff". E.E.O.C. v. Flasher Co., Inc., supra at 1319, citing Felton v. Trustees of California State Univ. and Colleges, 708 F.2d 1507, 1508-09 [9th Cir. 1983]. Title VII does not make unexplained differences in treatment per se illegal nor does it make inconsistent or irrational employment practices illegal. It prohibits only intentional discrimination based upon an employee's protected class characteristics. E.E.O.C., supra.

In a disparate treatment claim relating to termination for violation of a work rule, a prima facie case is established once the plaintiff shows (1) that the plaintiff belongs to a protected class; (2) that he was discharged for violating a work rule; and (3) that similarly situated non-minority employees were treated differently." E.E.O.C., supra, citing McAlester v. United Air Lines, 851 F.2d 1249, 1260 (10th Cir. 1988).

The contention that Ms. Lanford was dismissed due to racial discrimination is

groundless. The record is void of any evidence as to whether the Appellant belongs to any protected class, and if so which class. Likewise, it is void of any evidence that the Agency was aware of her belonging to a protected class. Therefore the Hearing Officer cannot conclude that she belongs to a protected class or that the agency was even aware that appellant belonged to a protected class. Therefore, a theory based upon disparate treatment must fail.

The Appellant has also failed to introduce credible evidence that similarly situated non-minority employees were treated differently. Thus, she has failed to establish two of the three-prong E.E.O.C.-McAlester test for disparate treatment.

Moreover, the evidence establishes that the Agency dismissed her because she falsified time records. The Appellant has failed to introduce any credible evidence that would support a presumption of discrimination by the Agency. The Appellant has therefore failed in her burden of proof in this regard.

In the case at bar the Appellant has not proven that similarly situated non-minority employees were treated differently. She has therefore failed to establish a prima facie case of disparate treatment based upon race by the Agency. Under the McDonnell Douglas analysis, the Appellant has failed to shift the presumption to the employer. The employer therefore has no obligation under the discrimination portion of the case, to rebut appellant's discrimination charge any further.

Justness of Discipline

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).

CSR §16-10 states:

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. (Emphasis added).

Thus, while the Hearing Officer may defer to the discipline imposed by the agency,

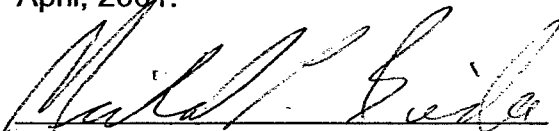
he is required to make an independent, *de novo* finding and determination as to the reasonableness of the discipline to be imposed, consistent with the provisions of CSR §§16-10, 2-10 (b) (4) and 2-104.

With respect to the reasonableness and appropriateness of the discipline, the Agency was justified in terminating Ms. Lanford's employment inasmuch as employees who work with cash must be trustworthy and Ms. Lanford's actions demonstrate that her integrity can be compromised. Her deceit continued throughout the hearing. She had been previously disciplined twice for similar offenses, including a suspension without pay. Given the pattern of intentional and continuing deceit by the Appellant and the involvement of other employees in the deception, the discipline imposed was reasonable and appropriate.

ORDER

The action of the agency of dismissing the appellant Denise Lanford from employment is hereby AFFIRMED without modification.

Dated this 27th day of
April, 2001.



Michael L. Bieda
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 20th day of April, 2001, addressed to:

John R. Palermo
Attorney at Law
30 Cook Ct.
Hudson, CO 80642

Denise Theresa Lanford
7130 Jasmine St.
Commerce City, CO 80022

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 interoffice mail, this 27th day of April, 2001, addressed to:

Richard A. Stubbs
Assistant City Attorney

Denver Health and Hospital Authority
Office of General Counsel
660 Bannock St. 5th Floor
MC 1919

Dr. Patricia Gabow
Denver Health and Hospital Authority

V. Grandis