

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

Appeal No. 394-01

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEAL OF:

Appellant: CLOYDE R. LEWIS

And

DENVER HEALTH AND HOSPITAL AUTHORITY

NATURE OF APPEAL

The Appellant Cloyde R. Lewis, (Appellant) is a Career Service Employee and has challenged his dismissal from his position as an Advanced Clinic Technician with Denver Health and Hospital Authority (Agency). The Agency dismissed the Appellant because of conduct that occurred between October and early December, 2001. The Agency contends Appellant violated Career Service Rule (CSR) §16-50 1), 12), 7), 16) and 20); 16-51 5), 7), 10) and 11).

Appellant contends the Agency violated CSR § 16-20 1A) and B; CSR 16-50 1), 2), 3), 10), 16), 17), and 20); CSR 16-51 2), 4), 5), 8), 10) and 11); CSR 16-54 A; CSR 19-10 f; CSR 15-102. Appellant denies all wrongdoing and is requesting to be reinstated with back pay.

INTRODUCTION

A hearing on this appeal was held before Michael A. Lassota, Hearing Officer for the Career Service Board. Appellant was present and not represented. The Agency was represented by Assistant City Attorney Sybil R. Kiskan, Esq., with Debra K. Carpenter serving as advisory witness for the Agency.

The following witnesses were called and testified at the hearing: Cloyde R. Lewis, Lachell Walker, Dr. Lori Szczokowski, Dr. Steven Hessel, Janet Fink, Sherry Stanger, Dr. Cynthia Kuehm, Dr. Ricky Artist, and Debra K. Carpenter.

Exhibits 1-10, 11-20 and exhibit B, were admitted into evidence either by stipulation or my ruling and were considered in this decision.

ISSUES ON APPEAL

Whether the Agency proved by a preponderance of the evidence that the Appellant violated provisions of the Career Service Rules.

If so, whether Appellant's dismissal was reasonably related to the seriousness of the offense(s), considering all of the circumstances, as required by the Career Service Rules?

Whether the Agency violated the Career Service Rules alleged by Appellant.

JURISDICTION

The alleged conduct that gave rise to this disciplinary action by the Agency occurred between October and December, 2001. Appellant was notified of the Agency's Contemplation of Disciplinary Action on November 27th, 2001. There was reference to another Contemplation of Disciplinary Action letter dated December 6th, 2001, in the Corrected Notice of Dismissal. A pre-disciplinary meeting was held on December 14th, 2001. Appellant was dismissed effective December 18th, 2001, by hand delivered Notice of Dismissal that day. Appellant filed his appeal with the Career Service Hearing Office on December 24th, 2001. A Corrected Notice of Dismissal was mailed to Appellant on January 25th, 2002. I contested the jurisdiction of a Hearing Officer to hear and decide this appeal until it was determined the appeal was timely filed. This was accomplished by the Agency producing a copy of the December 18th, 2001, Notice of Dismissal.

Based upon these facts, I find that this appeal has been timely filed. And, under CSR §§ 19-10 (b) and 19-27, I have authority to affirm, reverse or modify the actions of the Agency.¹

¹ CSR § 19-10(b) provides:

Actions subject to Appeal

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

- b) Actions of an appointing authority: Any action of an appointing authority resulting in dismissal, suspension, involuntary demotion, disqualification, layoff, or involuntary retirement other than retirement due to age which results in alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

CSR § 19-27 provides:

The Hearings Officer shall issue a decision in writing affirming, modifying, or reversing the action, which gave rise to the appeal. This decision shall contain findings on each issue and shall be binding upon all parties.

RELEVANT FACTS

1. At all times relevant to this discipline Appellant was assigned to the Denver International Airport (DIA) Clinic as an Advanced Clinic Technician.
2. Appellant engaged in work for another employer while on Agency time at the DIA Clinic. Specifically, Appellant received from and sent faxes to his other employer on the Agency's fax machine. Appellant made and received phone calls, from his other employer, while working at the clinic. Appellant brought completed work for the other employer to the clinic and prepared it for mailing.
3. During the months of August, September, and October, 2001, Appellant made numerous long distance calls to Colorado Springs on clinic phones while on Agency time.
4. On November 1st, 2001, Appellant argued with another employee when asked to help with clinic business, while he was reviewing work for his other job.
5. On November, 15th, 2001, Appellant argued with Dr. Szczukowski when questioned by the doctor about the way he screened a call for the doctor.
6. Appellant was aware of and signed a copy of the Agency Confidentiality Policy on January 30th, 2001.
7. Appellant gave a doctor, not associated with the DIA Clinic, a patient's chart in violation of the Confidentiality Policy, even after another employee told Appellant his action would violate the policy.
8. Appellant had a pre-disciplinary hearing on December 14th, 2001, was terminated on December 18th, 2001, and filed his appeal on December 24th, 2001.

DISCUSSION AND CONCLUSIONS OF LAW

As a 7 year employee, Mr. Lewis has Career Status as a Career Service Employee and may not be disciplined or dismissed without just cause.² Appellant is accused of violating the following Career Service Rules, Executive Orders, or Departmental Rules and Regulations:

§ 16-50 Discipline and Termination

² CSR § 5-62 provides:

Employees in Career Status

An employee in career status

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

A. Causes for Dismissal.

The following may be cause for dismissal of a career service employee. A lesser discipline other than dismissal may be imposed where circumstances warrant. It is impossible to identify within this rule all conduct which may be cause for discipline. Therefore, this is not an exclusive list.

- 1) Gross negligence of willful neglect of duty.
- 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 employee is on duty or on City and County premises.
- 7) Refusing to comply with the orders of an authorized supervisor or refusing to do assigned work which the employee is capable of performing.
- 16) Divulging confidential information from official records to unauthorized individuals.
- 20) Conduct not specifically identified herein may also be cause for dismissal.

§ 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 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.

- 4) Failure to observe departmental regulations.
- 7) Unauthorized operation or use of any vehicles, machines, or equipment of the City and County.
- 10) Failure to comply with the instructions of an authorized supervisor.
- 11) Conduct not specifically identified herein may also be cause for progressive discipline.

The City Charter, §C5.25 (4) and CSR §2-104 (b)(4) require the Hearing Officer to determine the facts in this matter “de novo”. The Colorado Courts have held that this requires an independent fact-finding hearing considering evidence submitted at the *de novo* hearing and a resolution of the factual disputes. *Turner v. Rossmiller*, 35 Co. A. 329, 535 P.2d 751 (Colo. App., 1975).

The party advancing a position or claim, in an administrative hearing like this one, has the burden of proving that position by a “preponderance of the evidence”. To prove something by a “preponderance of the evidence” means to prove that it is more probably true than not (Colorado Civil Jury Instruction, 3:1).³ The number of witnesses testifying to a particular fact does not necessarily determine the weight of the evidence (Colorado Civic Jury Instruction 3:5).⁴ The ultimate credibility of the witnesses and the weight given their testimony are within the province of the Administrative Law Judge or Hearing Officer. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). As the trier of fact, the Hearing Officer determines the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

In its dismissal letter, the Agency claims Appellant violated the numerous Career Service Rules outlined above. Therefore, the Agency has the burden of proving the allegations contained in the letter of dismissal by a preponderance of the evidence.

The first allegation is the Appellant is guilty of “Gross negligence or willful neglect of duty” in violation of CSR §16-50 A (1). Neither Career Service rules nor their definitions define either “willful” or “gross”. These two words are interrelated and will be discussed together.

“Negligence” is a failure to use reasonable care or a failure to act in a reasonably prudent manner under the circumstances. *Lavine v. Clear Creek Skiing Corp.*, 557 F.2d 730 (10th Cir. 1977); *Metropolitan Gas Repair Service, Inc. v. Kulik*, 621 P.2d 313 (Colo. 1980); *Rice v. Eriksen*, 476 P.2d 579 (Colo. App. 1970). Gross negligence involves a higher form of culpability than mere negligence. “Gross” in this context means flagrant or beyond all allowance, *Lee v. State Board of Dental Examiners*, 654 P.2d 839 (Colo. 1982), or showing an utter lack of responsibility, *People v. Blewitt*, 192, Colo. 438, 563 P.2d 1 (1977). Willful neglect of duty transcends any form of negligence and involves conscious or deliberate acts. See *Turner v. Lyon*, 189 Colo. 234, 539 P.2d 12541 (1975); *Drake v. Albeke*, 188 Colo. 14, 532 P.2d 335 (1975).

“Gross” has been generally defined as: “Glaringly obvious: egregious.”⁵

³ The notes on use of Instruction 3.1 state: Generally, in all civil cases, “the burden of proof shall be by a preponderance of the evidence...” citing C.R.S. § 13-25-127.

⁴ The content of this instruction was approved as an instruction in *Swain v. Swanson*, 118 Colo. 509, 197 P.2d 624 (1948). The rule stated is also supported by *Green v. Taney*, 7 Colo. 278, 3P. 423 (1884) and C. McCormick, EVIDENCE § 339, at 957 (E. Cleary 3 ed., 1984).

⁵ Webster’s II New Riverside Dictionary, Office Edition, Berkley Books, New York; copyright 1984.

Black's defines it as:

"Great; culpable. General absolute; not to be excused; flagrant; shameful; as a gross dereliction of duty; a gross injustice; gross carelessness.⁶

Black defines "Gross negligence" as:

"The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness. "Gross negligence: is substantially higher in magnitude than simple inadvertence, but falls short of intentional wrong." (Cite omitted).⁷

"Willful" is generally defined as: "Said or done deliberately; stubborn."⁸

Black's defines Willful as:

"Proceeding from a conscious motion of the will; voluntary. (Cite omitted). . . . Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently." (Cites omitted).⁹

Testimony from DIA Clinic Nursing Program Manager Debra Carpenter, Appellant's direct supervisor, was Appellant violated this rule by ignoring his job responsibilities at the clinic. He did so by reviewing work assignments for another employer. Receiving and transmitting faxes on the clinic fax machine to another employer, receiving and making phone calls to this other employer, preparing work for mailing to that other employer, and arguing with co-workers when asked to stop and help them with clinic work. When confronted by Carpenter, Appellant's response was no one had ever told him he couldn't do work for his other employer while at the clinic.

It is common knowledge in the working world that an employee does not do work for other employers without the consent of the employer whose time he is using to complete that work. It is the employee's obligation to seek that consent, not the employer's obligation to tell the employee not to do work for other employers. This is

⁶ Black's Law Dictionary, Fourth Edition; West Publishing Co. copyright 1951.

⁷ Black's Law Dictionary, Fourth Edition; West Publishing Co. copyright 1951.

⁸ Webster's II New Riverside Dictionary, Office Edition, Berkley Books, New York; copyright 1984.

⁹ Black's Law Dictionary, Fourth Edition; West Publishing Co. copyright 1951.

willful neglect of duty for which Appellant has no justifiable excuse. The Agency's allegation Appellant violated this rule is affirmed.

Appellant is accused of violating CSR § 16-50 2) because his unauthorized use of the clinic fax machine & the paper used to receive, and send information to his other employer was theft of city property. Also, the clinic phones were used to make unauthorized long distance phone calls. Regarding the fax machine, Appellant again contends no one told him to not use it for other than clinic purposes. Appellant testified he was given, at least tacit approval to call Colorado Springs to confirm his orders for military duty. During August and September of 2001, 12 calls were made to Colorado Springs. It was never clarified how many regarded his orders for duty there in September, 2001. In October, 2001; however, there were 25 calls to Colorado Springs. Appellant testified these calls were to get authority for additional military training in November, 2001. Further questioning revealed the true purpose of these calls was to straighten out a pay issue with the military. Appellant testified he could have used his personal cell phone to make these calls but did not want to use it while on duty at the clinic. Appellant's authority to call Colorado Springs to clarify military orders is marginal at best. Appellant had no authority to use clinic phones to make long distance calls to Colorado Springs, to straighten out military pay issues. The Agency's allegation Appellant violated this rule is affirmed.

Carpenter testified that on more than one occasion she told Appellant to not do work for another employer while at the clinic, yet he continued to do so. Carpenter observed Appellant argue with another employee when that employee asked Appellant to stop work for his other employer and help with clinic work. When Carpenter intervened, Appellant became belligerent with her. The Agency's allegation Appellant violated CSR §16-50 7) is affirmed.

Appellant is accused of violating CSR § 16-50 16) regarding divulging of confidential information from official records to unauthorized individuals. This was done when Appellant gave a patient chart to a doctor not on staff at the DIA Clinic. Appellant explained that a city employee, at the clinic for treatment, told Appellant he would like to talk to a foot specialist. When a doctor, not associated with the DIA Clinic, came in to the clinic, who Appellant recognized as a doctor from another city clinic, he showed the patient's chart to that doctor. This was after a DIA Clinic employee told him he was not allowed to give referrals and he could not give the patient chart to the doctor. Appellant told the employee he had verbal consent from the patient to give the patient's chart to the doctor.

On January 30th, 2001, Appellant signed a copy of the Agency Confidentiality Policy. Nowhere in that policy does it say anything other than written consent from a patient is needed to divulge that patients' information to anyone. Dr. Szczokowski, a DIA Clinic doctor who supervises Appellant's work, testified verbal consent from a patient was not valid consent to divulge patient information to anyone and that Appellant knew the Confidentiality Policy. Carpenter testified the policy was "sacred" and the Code of

Ethics, which Appellant was also aware of, was even more important. The allegation Appellant violated this rule is affirmed.

CSR § 16-50 20) is a catchall rule that was not considered in this decision because all other CSR 16-50 rule violations were affirmed.

It has been previously explained how Appellant violated CSR § 16-51 4) and 7). The allegation violated these rules is affirmed.

Appellant is accused of violating CSR § 16-51 10) by failing to comply with the instructions of an authorized supervisor. Dr. Ricky Artist, Appellant's own witness, testified Appellant was a free spirit, an independent thinker and actor and not negligent when it comes to patient care. When cross-examined by the Agency, Dr. Artist testified Appellant pushed the envelope more than other staff member at the clinic. Appellant was more resistant to authority than the other staff members, he was a "lose canon" who was more independent than necessary.

Dr. Szczokowski testified that she supervises work of the Appellant. She testified that the call screening procedure for the doctors at the clinic has been explained to staff, including Appellant, many times. She has personally explained to Appellant two or three times the importance of call screening. On November 15th, 2001, Appellant put a call through to her from a patient without following procedure. As a result, she had no idea to whom she was speaking. When she explained to Appellant again the necessity for , at the very least, getting the person's name and giving it to the doctor before transferring the call, Appellant gave her a "litany of reasons" why he should not have to do so. The Agency's allegation Appellant violated this rule is affirmed.

CSR § 16-51 20) is a catchall rule that was not considered in this decision because all of the other CSR 16-51 rule violations were affirmed.

Appellant's allegation the Agency violated CSR 16-20 1) a) and b)¹⁰ is denied. Appellant presented no evidence refuting the Agency's choice of discipline, in this case termination, or that the discipline imposed was not reasonably related to the seriousness of the offense. Appellant's testimony was he did not violate any Agency policies and he did not do anything wrong. He knew how to access rules and policies if he had questions about them and he knew he should not use clinic equipment for personal use.

Appellant's allegation the Agency violated CSR 16-50 1), 2), 3), 10), 16), 17), 20), and CSR 16-51 2), 4), 5), 8), 10) and 11) regarding discipline is denied. These are the rules an Agency uses to discipline an employee, not for an employee to allege the Agency violated. Even if the Agency could be found in violation of these rules, there was no evidence presented as to how these rules were violated.

¹⁰ Section 16-20 is the progressive discipline rule. § 1) a) and b refer to verbal reprimands and written warnings.

Next Appellant alleges the Agency violated CSR 16-54 A). This is guiding rule for the Agency when it elects to give an employee a written reprimand. The only way the Agency can violate this rule is by not following the rule's guidance when issuing an employee a written reprimand. The rule has no applicability to this appeal.

Appellant alleges the Agency violated CSR 19-10 f) and CSR 15-102, they discriminated against him. To have a valid claim of discrimination the Appellant has the burden to prove the Agency discriminated against him because of his race, national origin, sexual orientation, physical or mental disability, age, gender, marital status, military status, religion, political affiliation, or any other basis protected by federal, state, or local law or regulation. *In The Matter of The Appeal of Martha Douglas*, Appeal No. 317-01 (order entered 3-22-02). There was no evidence presented by Appellant whatsoever that he was discriminated against. All testimony from Agency witnesses was Appellant was never discriminated against. Appellant's allegation the Agency violated this rule is denied.

JUSTNESS OF DISCIPLINE

The remaining issue is whether the discipline imposed is just given the circumstances, whether it is reasonable. The reasonable alternatives are always no discipline up to and including termination as discipline. The question then becomes; what is reasonable discipline by the Agency given the facts and circumstances of the appeal being considered by the Hearing Officer?

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 consistent with CSR 16, DISCIPLINE.

The purpose of Rule 16 is stated in § 16-10:

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.

In § 16-20 1) the appointing authority or designee is authorized to impose discipline from as slight as a verbal reprimand to as severe as dismissal. In § 16-20 2) the instruction is:

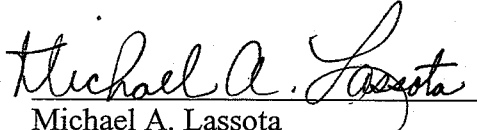
Whenever practicable, discipline shall be progressive. However, any measure or level of discipline may be used in any given situation as appropriate. This rule should not be interpreted to mean that progressive discipline must be taken before an employee may be dismissed.

Debra Carpenter testified that when contemplating discipline she took into consideration the fact Appellant had no previous discipline. Further, she believed if suspended, Appellant would not come back to work a better employee. Moreover, Appellant showed no regret for his actions, he felt everything he did was justified, and never apologized. Because of these reasons, combined with staff lack of confidence in Appellant, termination was the only reasonable choice. Appellant still does not believe he did anything wrong.

DECISION AND ORDER

Based on the Discussion and Conclusions of Law above, I find termination to be reasonably related to the seriousness of the offense. The Agency had just cause to terminate Appellant. The action of the Agency to terminate Appellant is affirmed.

Dated March 27th, 2002.



Michael A. Lassota
Hearing Officer
Career Service Board

CERTIFICATE OF MAILING

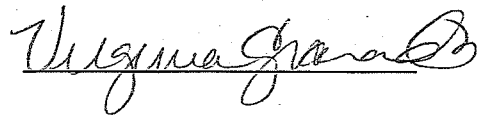
I hereby certify that I have forwarded a true and correct copy of the foregoing **FINDING OF FACT, CONCLUSIONS OF LAW AND ORDER** by depositing same in the U.S. mail, postage prepaid, this 28th day of March, 2002, addressed to:

Cloyde R. Lewis
15472 E. Evans Ave. Apt. 207
Aurora, CO 80013

I further certify that I have forwarded a true and correct copy of the foregoing **FINDING OF FACT, CONCLUSIONS OF LAW AND ORDER** by depositing same in interoffice mail, this 28th day of March, 2002, addressed to:

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

Dr. Patricia Gabow
Denver Health and Hospital Authority


Virginia Garabito