

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

Appeal No. 19-05

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**DECISION**

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IN THE MATTER OF THE APPEAL OF:

**TINA MARTINEZ**, Appellant,

vs.

**DENVER DEPARTMENT OF HUMAN SERVICES**, Agency,  
and the City and County of Denver, a municipal corporation.

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**I. PROCEDURAL INTRODUCTION**

The Appellant, Ms. Tina Martinez, appeals the denial of her grievance concerning a written reprimand assessed by her employer, the Denver Department of Human Services (Agency), for alleged misconduct under the rules of the Career Service Authority (CSR). The Appellant claims the Agency's discipline was meritless and was based upon unlawful retaliation and harassment.

The Agency served notice of its written reprimand on the Appellant January 27, 2005. The Appellant filed her first-level grievance with her immediate supervisor pursuant to CSR 18-12, on February 4. When her immediate supervisor denied the Appellant's grievance on February 7, the Appellant filed her second-level grievance with the Agency head on February 8. The Agency head designee, Deputy Manager Valerie Brooks, denied the second-level grievance on February 15. The Appellant then filed her appeal of that denial on February 25, 2005.

A hearing concerning the appeal was conducted on June 1, 2005, by Hearings Officer Bruce A. Plotkin. The Agency was represented by Neils Loechell, Esq. with Ms. Linda Proctor serving as advisory witness. The Appellant was present and represented by N. Nora Nye, Esq.

Agency Exhibits 1-5 were admitted by stipulation. Exhibit 6 was admitted over objection. Exhibit 7 was withdrawn. Appellant's Exhibits A-D and I were admitted by stipulation. Exhibit F was admitted over objection, while Exhibits E, G, and H were withdrawn.

The Agency presented the following witnesses: Ms. Linda Proctor, and Ms. Leola Davis. The Appellant testified on her own behalf and also offered the testimony of Ms. Jennifer Kelly-Sweet, and Ms. Karen Quintana.

## **II. ISSUES**

The following issues were presented at Hearing:

1. whether the Agency had just cause to assess a written reprimand against the Appellant under any of the following Career Service Rules(CSR): 16-50 A. 7), 16-50 A. 1), CSR 16-50 A. 10), CSR 16-50 A. 20), CSR 16-51 A. 2), CSR 16-51 A. 6), CSR 16-51 A. 10), and CSR 16-51 A. 11);
2. whether the Agency engaged in unlawful retaliation against the Appellant;
3. whether the Agency engaged in unlawful harassment against the Appellant;
4. if the Agency had just cause to discipline the Appellant, whether its written reprimand was reasonably related to the seriousness of the offense, and took into consideration the Appellant's past record.

## **III. FINDINGS**

A. Jurisdiction. Jurisdiction was not challenged. The Hearings Officer finds the subject of a written reprimand is within his jurisdiction. The Appellant filed her appeal timely.

### **B. Background**

The Appellant has held the position of Administrative Assistant IV with the Denver Department of Human Services (Agency) for three and one half years. Her working title is Food Stamp Technician. In that capacity, she processes data for food stamp eligibility from food stamp applicants who were deemed eligible. She also checks re-certification eligibility for existing clients.

The state of Colorado installed a new computer system named Colorado Benefits Management System, or CBMS, for use by all 64 counties' human services department. The new system was placed into service in September, 2004, evidently prematurely. The functional woes of that system have been well documented by the media. CBMS would sometimes not allow entry of new clients' information; if more than one employee logged on, the system would shut down; if more than one department's information were accessed, the system would re-run programs, changing benefit amounts, reimbursements, and even remove names from the system. In addition, false recovery notices were generated as well as double payment to some recipients. By January,

2005, as a result of the problems created by CBMS, the Appellant and other technicians' voice mails were flooded with complaints, primarily because cases were not being processed within 30 days. Responding to those complaints averaged two hours of work time per day. Before the September 2004 conversion to CBMS, the Appellant never had a problem keeping up with her case load. By January 2005, she and the other food stamp intake technicians had at least a thirty day backlog of entries.<sup>1</sup>

Federal and state regulations require that food stamp cases be fully processed within thirty days for re-certification applicants. After CBMS, the Agency was out of compliance with that requirement. Even though the state-installed system was the cause of delay, the state made no rule changes to accommodate the backlog created by its system. The Appellant's second-level supervisor, Ms. Linda Proctor (Proctor) acknowledged that compliance with those regulations was unrealistic after CBMS problems surfaced. Extra help was hired to assist the technicians to catch up with the backlog of re-certification data entries, but not until after the date of this discipline. [Proctor cross examination].

The Agency originally based its claims against the Appellant upon facts alleged in its January 27, 2005 notice of written reprimand to the Appellant, [Exhibit 2]. That notice references the Appellant giving incorrect information to a client regarding a recovery notice, but little was subsequently made of it, either in the notice or at hearing. As a preliminary matter, the Hearings Officer finds the Agency did not consider the recovery notice was a factor in its discipline of the Appellant.

The remaining basis for discipline in the Agency's January 27 notice can be summarized as follows. In December 2004, the Appellant told a client her re-certification would be processed within 30 days. On January 27, 2005, after the 30<sup>th</sup> day, the client called the Appellant to complain she still had not heard about her case. The Appellant told her it would take longer to process, so the client called Proctor to complain. After fielding the client call, Proctor met with the Appellant and ordered her to stop telling clients it would take longer than 30 days to process their cases. The Appellant refused, so Proctor assessed a written reprimand for disobedience.

At hearing, the Agency presented a murkier basis for discipline, as evident in the following cross-examination of Proctor.

Q: So Tina [the Appellant] originally did give the right information, then. She originally told [the client], it would take 30 days, but then it didn't happen in 30 days, because of all this CBMS mess, so to speak, and so then she was complaining because Tina said it was gonna take longer than 30 days, maybe 60 days, so that was the problem...?

A: The correct answer is Tina was telling not just this client. She had told other clients it would take 60 days, when our guidelines are it would take 30 days. I had asked Tina prior to that to stop telling clients that. The

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<sup>1</sup> According to the Appellant there was a 90-day backlog at that point. [Appellant testimony].

same complaints went to administration, and I'd asked her to stop telling clients that. That was the directive.

...

Q: The directive is what to tell the client when they first call in about their application. That is 30 days, is that correct?

A: 30 days.

Q: You're not to tell them 30 to 60 days at the beginning of their application...

A: 30 days period, and if you don't process the case within that time frame, you pull it and process it. Period!

Q: How many cases were taking longer than 30 days?

A: There was probably a number of cases, but I only follow up on cases where they call and complain. If they call me and they complain, and it was past the 30 days, it was the directive to Tina and all employees was "pull the case, process it."

Q: That's a different directive than not telling them 30-60 days in the beginning, is that correct?

...

A: That's not a directive, that's a regulation. Our regulation is to process our cases in 30 days, and to get from under our cap, and not lose the money and funding, if we know we're outside of that regulation, we do what we're supposed to do: process the application.

...

Q: So what was she doing wrong? She was telling them after the 30 days that it would be pulled and processed right away, is that--

A: What Tina did wrong was not follow a directive. That's the whole point.

Q: What was the directive?

Agency Attorney: Objection, asked and answered.

Hearings Officer: Overruled.

Q: What was the directive?

A: The directive was to process the application within 30 days. If she could not do it, we had assistance and help. Tina had a person that was working side-by-side with her to--

Q: What was the directive--

A: To process the cases in 30 days.

Q: This case was already past 30 days. What was the directive to Tina after 30 days? Please answer my question.

A: To stop telling clients that she'd process the case in 60 days, and to process the application. Period.

Q: So that's a whole different directive than what you had stated in the written reprimand?

A: The written reprimand was based on Tina told me she would not do something.

It was unclear from Proctor's testimony what clear order the Appellant disobeyed. The first basis, stated in the notice of discipline, is: stop telling clients it will take 60 days to process their cases, because there are resources to assist compliance, presumably within the 30-day requirement. [see Exhibit 2]. The problem here is no other technician was able to comply with the 30-day requirement. That lack of clarity was also reflected by testimony from the Appellant's other witnesses. [Jennifer Kelly-Sweet testimony, Karen Quintana testimony]. Kelly-Sweet is also a food stamp case worker. She testified she attended the same meetings attended by the Appellant, and Proctor never mentioned the 30-day order. Kelly-Sweet also stated she was unaware of any standing order not to tell clients it would take longer than 30 days to process their cases. She admitted that, as the Appellant, she told clients it would take longer than 30 days to process their cases, but stopped that practice only after the Appellant was disciplined in this case. Her credibility was not challenged.

At hearing, Proctor raised three additional "directives," each of which, she concluded, was a reason she disciplined the Appellant. Proctor stated "it was the directive to Tina and all employees [that after 30 days expired and clients called to complain] 'pull the case, process it,' because we have additional resources to do so." [Proctor cross examination]. But, as stated previously, there were no such resources in place until later, so even if this were a clear directive, it is not established that the Appellant could have complied on January 27.

Proctor's third directive was to process the application within 30 days, in accordance with state regulation. This differs from the first directive, to tell clients who call after 30 days that their cases will be processed within 30 days, and differs from the second directive, after 30 days, to pull and process the

complaining client's case. This third directive was impossible to meet due to the failures of the CBMS system.

Proctor's fourth basis for discipline against the Appellant was for the Appellant's leaving their January 27 meeting prematurely. Proctor testified: "[the Appellant] stood up and told me I could talk to her and her union rep if I had any other questions, and walked out. While she was walking out, I explained to her that the conversation was not over, that we needed to discuss this further. She stated again that I could make an appointment with her and her rep, and I did tell her if she left my office, she would face further repercussions." Thus, discipline, i.e., further repercussions, appears to have been assessed in this instance for the Appellant walking out on her supervisor.

#### **IV. ANALYSIS**

##### **A. CSR 16-50 A. 7) Refusing to comply with the instructions of an authorized supervisor or refusing to do assigned work which the employee is capable of performing.**

In order to discipline an employee under this rule, the Agency must first put the employee on reasonable notice of the instruction the employee is to obey. The Hearings Officer concludes the Agency's shifting evidence at hearing failed to establish such reasonable notice to the Appellant. The original order, as described in exhibit 2, was not to tell clients their cases would take more than 30 days. Then Proctor advanced three new "directives" at hearing none of which was clearly communicated to or understood by the Appellant before discipline was imposed on January 27. Proctor testified she had told the Appellant, and all other technicians at prior meetings about the 30 day order, but neither Kelly-Sweet nor Quintana remembered hearing it, and their credibility was not questioned. The Agency's failure to provide reasonable notice to the Appellant which instruction she must obey, constitutes a failure to prove the Appellant violated CSR 16-50 A. 7) by a preponderance of the evidence.

##### **B. CSR 16-50 A. 1) Gross Negligence or Willful Neglect of Duty**

There are two issues to resolve with the Agency's claim here. The first issue is what work duty the Agency alleges the Appellant failed. In order to uphold the discipline of an employee under CSR 16-50 A. 1), the Agency must first establish the employee was grossly negligent of, or willfully neglected, some specified duty. For reasons explained fully above, the Agency failed to meet its burden to establish for what duty the Appellant was grossly negligent.

The second issue, assuming the Agency's basis for discipline was its January 27 letter, is whether refusing to obey a supervisor can also be construed as gross negligence of a duty, as that word is contemplated by CSR 16-50 A. 1). The Agency

constructed its case on the Appellant's refusal to comply with Proctor's order "stop telling clients it will take more than 30 days to process their cases." The Agency, therefore equates Proctor's order with a work duty of which the Appellant was grossly negligent when she refused to comply.

An employee's refusing to obey the order of an authorized supervisor can be gross negligence of a duty, or willful neglect of a duty, if the order advances a legitimate agency objective and is reasonably obtainable. Therefore, in a case where an employee refused a repeated order to perform a job duty because she felt others should have performed that function, and it was not in her job description, it was willful neglect of duty in violation of CSR 16-50 A. 1) since the Agency had a legitimate interest in distributing specific tasks, and the Appellant was capable of performing them. In re Leal-McIntyre, CSA 167-03 (1/27/05). In another case, a deputy sheriff was grossly negligent in violation of CSR 16-50 A. 1), when he willfully disobeyed orders, since ignoring those orders could have led to a jail security breach. In re Crenshaw, CSA 156-02 (2/11/03).

On the other hand, in a case similar to the present case, all Denver Dept. of Human Services intake technicians for TANF were instructed to take on additional responsibilities as a result of a departmental reorganization. The Appellant did not complete the additional tasks, but no co-worker completed the additional responsibilities either. Under those circumstances, the Hearings Officer found the Agency failed to prove even simple negligence, and certainly not gross negligence, or willful neglect of a duty. In re Cedillo, CSA 130-02, 85-02,13-14 (12/18/02)(Hearings Officer Rossenfeld). In that case, a reasonableness standard was imputed to the Appellant's conduct, such that "[n]egligence, whether 'gross' or not, requires that the actor act in an unreasonable manner." *Id*, at 13.

Applying those standards to this case, the Agency had a legitimate interest in complying with federal and state requirements to process recertification cases within 30 days, since what was at stake was food for needy clients and significant penalties to the Agency for failure to comply. However, because the client complaint which triggered Proctor's order did not originate until after the 30-day deadline, the objective was not reasonably obtainable, and therefore, not a violation of this rule.

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

The Agency identified specific conduct by the Appellant which it considered to be violations of more specific rules. Therefore, this allegation is dismissed.

D. CSR 16-51 A. 2) Failure to meet established standards of performance including either qualitative or quantitative standards.

The Agency claims federal and state laws require processing of food stamp recertification cases within 30 days. Since the Appellant failed to meet that standard, according to the Agency, she violated this rule. It is already established the only time cases were brought to the attention of the Agency were upon client complaints for failure to meet the 30 day requirement. The Agency further recognized the 30 day requirement was not being met and could not reasonably be met: "Q: How many cases were taking longer than 30 days? A: There was probably a number of cases, but I only follow up on cases where they call and complain. [Proctor cross examination], see *also* [Appellant testimony, Kelly-Sweet testimony]. Where, as here, the Agency charged the Appellant with a standard, or standards that could not reasonably be met, then Agency failed to prove the Appellant violated CSR 16-51 A. 2) by a preponderance of the evidence.

E. CSR 16-51 A. 6) Carelessness in performance of duties and responsibilities.

The same problem arises here as for the discussion, above, concerning gross negligence. The Agency failed to identify what specific duty or duties were performed carelessly. First, the "duties" as alleged by the Agency were more in the nature of orders violated, than duties to be performed, e.g. "stop telling clients it will take more than 30 days to process their cases," "don't walk out of a meeting with me, your supervisor." The only stated duty, to process cases within a state and federally-mandated 30 days, was not possible to comply with. Therefore, the Agency failed to prove the Appellant violated CSR 16-51 A. 6) by a preponderance of the evidence.

F. CSR 16-51 A) 10). Failure to comply with the instructions of an authorized supervisor.

The same discussion concerning CSR 16-50 A. 7), refusing to comply with the instructions of an authorized supervisor, applies equally, here. For the same reasons stated there, the Agency failed to prove the Appellant violated this rule by a preponderance of the evidence.

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

The Agency did not present any evidence which might tend to prove this more general violation by the Appellant. This violation is therefore dismissed.

## **V. CONCLUSION**

The Agency's evidence against the Appellant was a moving target. The Agency's notice of discipline first defined the Appellant's misfeasance as her refusing Proctor's order "stop telling clients it will take more than 30 days to process their cases." Then, evidence at hearing revealed three additional bases for discipline: 1. pull the case, and process it; 2. Process all applications within 30 days; 3. don't walk out while I'm talking to you. The Agency may charge the Appellant with multiple violations, but here, it alleged only one basis in its notice to the Appellant, then seemed to shift that basis as the hearing progressed. It is foremost for that reason that the Hearings Officer concludes the Agency failed to establish the Appellant violated any of the rules alleged by the Agency. In addition, however, even assuming the Agency properly identified, and placed the Appellant on notice of the allegations it wished to pursue, it was not possible to comply with those orders. The Agency fails on that basis, as well, to establish the Appellant violated any of the cited rules by a preponderance of the evidence.

The Appellant's claims against the Agency are rendered moot by this decision. Moreover, the Appellant failed to establish either harassment or discrimination by the Agency.

## **VI. ORDER**

The Agency action in assessing a written reprimand against the Appellant on January 27, 2005, is REVERSED. The Appellant's personnel record shall be amended accordingly, and references to the written reprimand therein shall be removed.

DONE this 27<sup>th</sup> day of June, 2005.

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Bruce A. Plotkin  
Hearing 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 June, 2005, addressed to:

N. Nora Nye, Esq.  
Colorado Federation of Public Employees  
1580 Logan St., Ste. 310  
Denver, CO 80203

Ms. Tina Martinez  
8356 Mitze Dr.  
Denver, CO 80221

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

Niels Loechell, Esq.  
Assistant City Attorney  
Denver Department of Human Services  
1200 Federal Blvd. 4<sup>th</sup> Floor  
Denver, CO 80204

Ms. Tamara Tyler  
Denver Department of Human Services

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