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

Appeal No. 07-02

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

TERRI GARRETT MCCARLEY, Appellant,

v.

Agency: Denver Health and Hospital Authority.

INTRODUCTION

For purposes of these Findings and Order, Terri Garrett McCarley shall be referred to as "Appellant." Denver Health and Hospital Authority shall be referred to as "Hospital." The Rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held March 19, 2002, before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant was present and was represented by Michael J. O'Malley, Esq. The Hospital was represented by Mark B. Wiletsky, Esq., Caplan and Earnest, LLC, with Mary Gillman serving as the advisory witness.

The Hearing Officer has considered the following evidence in this decision:

The following witnesses were called by and testified on behalf of the Hospital:

Cecelia Garcia, Patricia Anne Bross, Sheila Mucklow, R.N., Michael Ernest, M.D., Mary Gillman

The following witnesses were called by and testified on behalf of the Appellant:

Appellant, Joyce Montoya

The following exhibits were offered and admitted into evidence on behalf

of the Hospital:

Exhibits 1 - 9

The following exhibits were offered and admitted into evidence on behalf of the Appellant:

None

The following exhibits were admitted into evidence by stipulation:

Exhibits 1 – 9

The following exhibits were offered but not admitted into evidence and therefore not considered in this decision:

None

NATURE OF APPEAL

Appellant is appealing her one-week suspension from the Hospital for alleged violations of CSR §§16-50 A. 2), 14) and 20) and 16-51 A. 4), 8) and 11). She alleges race, color, sex, age and creed discrimination. She is seeking reversal of the one-week suspension, restoration of back pay and benefits, and removal of associated documents for her personnel file.

ISSUES ON APPEAL

Whether Appellant violated CSR §§16-50 A. 2), 14), and 20) and 16-51 A. 4), 8) and 11)?

If Appellant violated any provisions of CSR §§16-50 and 16-51, what is the appropriate sanction?

Whether the Hospital's decision to discipline and suspend Appellant was discriminatory in nature?

PRELIMINARY MATTERS

A prehearing conference was held on March 12, 2002. At that time, Appellant had three different appeals pending before the Hearing Officer: CSA Case No. 395-01 (grievance appeal of "below expectations" rating on annual Performance Enhancement Program Report); CSA Case No. 25-02 (grievance appeal of "below expectations" ninety-day interim PEPR); and the instant case. The parties sought clarification as to which matter was to be heard on March 19. The Hospital was also concerned that Appellant had raised new issues in her

Prehearing Statement that had not been raised in the Notice of Appeal. During that conference, the Hearing Officer clarified that she would be hearing only the instant case on March 19. The appeals regarding the PEPRs would be heard at a later date (May 6). She also confirmed that, while Appellant had raised several types of discrimination in the Notice of Appeal, she did not claim retaliation or harassment at that time (as she had for the other two cases). Appellant's raising those defenses in her Prehearing Statement was found to be untimely. Only the claim of discrimination could be considered at the hearing on the instant matter.

FINDINGS OF FACT

1. Appellant was employed by the Hospital for approximately 15 years. Over the course of her career at the Hospital, Appellant has served in a number of capacities, including training director, acting personnel director, and disease prevention and control coordinator At the relevant time, she was classified as a Program Administrator, working under Mary Gillman, Operations Coordinator. She was responsible for preparing Health Professional Shortage Agency ("HPSA") grants. She was an exempt employee.

2. Appellant had previously been terminated by the Hospital for alleged violations of the CSR. After a hearing before the Hearing Officer, the Hospital was ordered to reinstate Appellant and issue a written reprimand for the violations that had been proved at the hearing. Appellant returned to work in September 2000. She was assigned to work for Ms. Gillman, who did not know Appellant prior to September 2000 and was not involved in the previous case.

3. During the relevant period, Appellant was working at 645 Acoma. Ms. Gillman was assigned to another location and did not see Appellant on a day-to-day basis. The people who worked in close proximity to Appellant were in a different department within the Hospital.

4. The female employees at 645 Acoma, including Appellant, use a restroom that is located near the office of Dr. Michael Ernest. It is a three-stall restroom.

5. During August or September 2001, the female employees noticed that someone was leaving urine on the toilet seat and spilling urine on the floor and walls of the stall. The person who was doing this was not cleaning up after herself. As a result, the female employees found it necessary to call housekeeping to clean the restroom during the day.

6. Several of the female employees complained to Cecelia Garcia, Dr. Ernest's secretary, about it. Ms. Garcia spoke to Dr. Luana Locke, the infection control officer, about the problem. Dr. Locke posted a sign the restroom. The sign read "Just like men in the men's room.. (sic) If you are not going to sit down, raise the seat. Leaving a wet seat is problem for the next person!" (Exhibit 5)

7. The sign seemed to help for a little while, but the problem started again by the beginning of October.

8. Appellant was the only person who complained about the sign to Ms. Garcia.

9. Ms. Garcia testified that, once, while she was using the toilet, she felt something wet hitting her leg from the next stall. She believed the substance to be urine. When she left the stall, she saw Appellant leave the stall from which the splatter had come.

10. Sheila Mucklow, R.N., testified that, as she is a large woman, she prefers to use the so-called handicapped stall because it is bigger than the others. One day she was waiting for the handicapped stall to become vacant. Appellant left the stall. Ms. Mucklow went in and noticed urine on the toilet seat. She testified that she recognized the substance as urine because it was yellow and that, as she has been a nurse for twelve years, she "knows what urine looks like." She also testified that she found urine on the toilet seat on an almost daily basis during that time period.

11. Because the problem began again, Ms. Garcia and Patricia Bross, Dr. Ernest's senior secretary, decided to talk to Dr. Ernest about it. They did not tell Dr. Ernest at that time who they suspected was the person who left urine on the toilet seat and throughout the stalls. After consulting with the legal department, Dr. Ernest instructed the women to monitor the restroom and determine who was causing the problem.

12. Ms. Garcia and Ms., Bross assigned every employee a coded number. Over the course of six days (October 2, 3, 15, 18, 19, 24), they monitored the restroom use. Because the restroom door was visible from Ms. Garcia's desk, she was primarily responsible for collecting the data. Ms. Bross monitored the restroom when Ms. Garcia was away from her desk. According to Ms. Garcia and Ms. Bross, they checked all three stalls every morning to make sure that the toilets were clean. Whenever one of them saw someone come out of the restroom, she would go in. She would then determine which stall the woman had used by noting which toilet was still flushing and look to see if the toilet seat was clean or dirty. They would then note the date, time, the individual's code number, and the results of the inspection onto a log. (Exhibit 4)

13. If there were two or three woman in the restroom and they could not determine which stall had been used by whom, Ms. Garcia and Ms. Bross did not note the information. They also did not note information if the restroom was used by someone who was not regular staff for the area (i.e., persons who were using the training room located in the building). If an unknown person used the restroom and left it dirty, they did not note the information. However, they would

have the toilet cleaned and start the observations again.

14. Over the course of the six days, there were 99 observations of someone going into the restroom. Twenty-one women were involved in the study, including Appellant, who was noted to have used the restroom ten times. The toilet was noted to be dirty four times (twice on October 18, once on October 19, once on October 24). On all four occasions, Appellant had been the last person to use the restroom before the urine was noted. There was never an observation of urine on the toilet seat after any of the other twenty women had used the toilet.

15. Based upon this information, Dr. Ernest contacted Ms. Gillman. He felt that any disciplinary action needed to come from Ms. Gillman since she was Appellant's supervisor.

16. Dr. Ernest testified that he was concerned about the problem not only from an aesthetic point of view. Urine on the toilet seat is a health issue and, in fact, violates public health laws because it can transmit diseases. Ms. Mucklow reiterated the concern about the health issues. Dr. Ernest also stated that he was concerned about staff morale and the numerous complaints about the problem.

17. Ms. Gillman first became aware of the infection control issue when she came back from emergency medical leave in October 2001. She was not told who might be involved at that time.

18. In November, Dr. Ernest told Ms. Gillman about the study and that Appellant was the one causing the problem. Ms. Gillman testified that this was the first time she learned of the study.

19. Ms. Gillman went to Dr. Ernest's office and got a copy of the study. She confirmed that Appellant had been at work on October 18, 19 and 24. (*See* Exhibit 6)

20. Ms. Gillman called Luana Locke at "Infection Control." Dr. Locke told her that she had hung up the sign (Exhibit 5); she sent a copy of the sign to Ms. Gillman.

21. Ms. Gillman went into the restroom and checked all the toilets to see if the problem could have been caused by "splash back." She testified that there was no "splash back" problem at 645 Acoma.

22. Ms. Gillman sent Appellant Contemplation of Disciplinary Action on December 21, 2001. Appellant was notified that the Hospital was contemplating discipline for alleged violations of CSR §16-50 A. 2), 14) and 20) and 16-51 A. 4), 8), and 11). The pre-disciplinary hearing was scheduled for December 28, 2001.

(Exhibit 3)

23. In addition to Ms. Gillman and Appellant, also present at the pre-disciplinary meeting were Dr. Richard Wright, Medical Director, Community Health Services, and Joyce Montoya, Appellant's union representative.

24. During the pre-disciplinary meeting, Appellant denied that she had been urinating on the toilet seat, floor and walls at any time. She indicated that she was been harassed, but did not provide any evidence to support the allegation. She made a general statement that there were "skirmishes" between various factions in the building, particularly with Dr. Ernest's employees. She provided no evidence of any prior issues with the staff she speculated was responsible for targeting her.

25. Ms. Gillman spoke with other staff from 645 Acoma after the pre-disciplinary meeting. She was not able to confirm Appellant's general accusation against these employees as "trouble makers."

26. Based upon the objective information contained in the study and the failure to find any evidence to support Appellant's general accusations about other employees, Ms. Gillman determined that discipline was appropriate. She looked at Appellant's prior disciplinary history. There were two actions in the file. One was the Written Reprimand issued pursuant to the July 19, 2000, order of the Hearing Officer in the prior case, for conduct that occurred in or around June 1999, and replacing the notice of termination from August 1999. (Exhibit 7) The second was a Verbal Warning that was issued on October 10, 2000, for unauthorized absences on September 26 and October 6 and taking an unauthorized break on October 10. 2000. (Exhibit 8) Based upon all the information before her, Ms. Gillman decided that a one-week suspension was appropriate.

27. Appellant was sent Notice of Suspension on January 11, 2002. (Exhibit 2). Her suspension was effective January 14 through 18, 2002.

28. Appellant filed this appeal on January 17, 2002.

29. At the hearing before the Hearing Officer, Appellant continued to deny that she had urinated on the toilet seat, floor or walls. She admitted she saw the sign (Exhibit 5) sometime during the summer and that she said to Ms. Garcia and Ms. Bross, "But this isn't a men's room" or "No one here uses the men's room." She claimed that the restroom was not kept in clean condition, that it was dirty, messy, sloppy, with paper on the floor and water all over. She stated no one ever talked to her about the problem until she received the Contemplation of Discipline right before Christmas. She provided vague testimony about "cliques" in the building were trying to "do things" to her. She claimed these "cliques" had done things to others and that she was the "new other." She

claimed these people did not want "other people" in 645 Acoma and they were trying to get rid of people from other units who worked in the building. She claimed these people had made this clear to her when she moved into the building in February 2001. She admitted Ms. Garcia and others who she said were in this "clique" had been friendly to her at first, but after Ms. Garcia had her child in November 2001, they were no longer friendly. She stated she was under surveillance by the Hospital at the time of the hearing and she has been followed around the City and around her neighborhood by a private investigator for the past two years

30. Joyce Montoya, Appellant's witness, testified she viewed the restrooms at 645 Acoma right after the pre-disciplinary meeting in December and they were in "poor condition." One stall was closed off and there was toilet paper on the floor. She did not recall observing water on the floor the time she looked at the restroom.

27. Appellant did not testify nor produce any evidence in support of her allegations of discrimination based upon race, color, sex, age, or creed.

DISCUSSION AND CONCLUSIONS OF LAW

Applicable Rules and Statutes

CSR Rule 16 governs discipline. CSR §16-10 sets out the purpose of the Rule:

> The purpose of discipline is to correct inappropriate behavior or performance. The type and severity of discipline depends on the gravity of the infraction. The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record. The appointing authority or designee will impose the type and amount of discipline she/he believes is needed to correct the situation and achieve the desired behavior or performance.
>
> The disciplinary action taken must be consistent with this rule. Disciplinary action may be taken for other inappropriate conduct not specifically identified in this rule.

CSR §16-20, Progressive Discipline, provides in relevant part:

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 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; and

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.

CSR §16-50, Discipline and Termination, provides, in relevant part:

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.

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.

14) Failure to use safety devises or failure to observe safety regulations which: result in injury to self or

others; jeopardizes the safety of self or others; or results in damage or destruction of City and county property.

20) Conduct not specifically identified herein may also be cause for dismissal.

CSR §16-51, Causes for Progressive Discipline, provides, in relevant part:

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.

4) Failure to maintain satisfactory working relationships with co-workers, other City and County employees or the public.

6) Neglect in care or use of City and County property.

11) Conduct not specifically identified herein may be cause for progressive discipline.

CSR §19-10 covers actions subject to appeal. It provides in relevant part:

§19-10 Actions Subject to Appeal

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

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 Ordinance relating to the Career Service, or the Personnel Rules.

c) Discriminatory actions: Any action of any officer or employee resulting in alleged discrimination because of

> race, color, creed, national origin, sex, age, political affiliation, sexual orientation, or disability ...

Analysis

The City Charter C5.25 (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. App. 329, 532 P.2d 751 (Colo. Ct. of App., 1975)

Because this is an appeal of a disciplinary action (one-week suspension), the Hospital has the burden of proof to demonstrate that its decision was within its discretion and appropriate under the circumstances. Appellant, having raised various types of discrimination as an affirmative defense, has the burden to establish that the decision was discriminatory.

Having had the opportunity to observe all the witnesses and after reviewing all the evidence submitted, the Hearing Officer concludes that the Hospital proved by a preponderance of the evidence that, despite her denials, Appellant was the person who urinated on the toilet seats, floors and walls in the women's restroom at 645 Acoma in October 2001. This conclusion is supported by the study conducted by Ms. Garcia and Ms. Bross. The study establishes that the four times that the toilet stall was left dirty was after Appellant used it. It is also supported by the testimony of Ms. Mucklow and Ms. Garcia, both of whom had personal encounters with the urine spray – Ms. Mucklow upon entering a stall Appellant had just left and Ms. Garcia having urine splashed on her leg while Appellant was in the adjoining stall. Appellant's testimony that these claims were made up because of some sort of conspiracy against her is incredible. There is no evidence that Ms. Garcia, Ms. Brass, Ms. Mucklow or any others made up the story and conspired to place the blame on Appellant.

Having found that Appellant engaged in the conduct complained of, the Hearing Officer must determine which, if any, provisions of the CSR have been violated.

Appellant is charged with a violation of CSR §16-50 A. 2) by "gross neglect" in the use of City and county property or property of any agency or entity having a contract with the City. She is also charged with a violation of simple neglect of property under CSR §16-51 A. 8). Since the CSR distinguishes the two types of conduct, the Hearing Officer must decide which one, if either, applies here.

While Appellant's conduct might be "gross" within the slang meaning of the word as something "disgusting," it does not rise to the level required by a legal definition of the term. "Gross" has been defined as "immediately obvious" or "glaringly noticeable usually because of inexcusable badness or

objectionableness."[1] *Black's* defines it as"

> [G]reat; culpable. General absolute; not to be excused; flagrant; shameful; as a gross dereliction of duty; a gross injustice; gross carelessness.[2]

The question for the Hearing Officer is whether the conduct rises to the level contemplated by this Rule. CSR §16-50 A. 2) includes theft and destruction of property along with the concept of "gross neglect." From this, the Hearing Officer concludes that the conduct that is subject to discipline under this provision must rise to the level that deprives the City of the use of the property in question, either through theft or destruction or other inexcusable or flagrant misuse. It is not meant to cover someone who fails to clean up after herself in the restroom, requiring others to look carefully before sitting down upon a toilet seat. The allegation of a violation of CSR §16-50 A. 2) is dismissed.

On the other hand, Appellant's failure to clean the toilet seat, floors and walls after she urinated on them would meet the lesser requirements of "neglect in care or use of City and County property" under CSR §16-51 A. 8). That allegation is affirmed.

Appellant is next charged with violating CSSR §16-50 A. 14), which concerns the failure to observe safety regulations, thereby jeopardizing the safety of herself or others. Dr. Ernest, Ms. Gillman and Ms. Mucklow testified that the problem was not just an aesthetic one; it was really an infections disease issue and violated State health regulations. The Hearing Officer agrees with this. Urine on toilet seats is unsanitary and can lead to the spread of urinary tract infections, if nothing else. This allegation is affirmed.

Appellant is charged with violating CSR §16-51 A. 4), failure to maintain a satisfactory working relationship with her co-workers. Failing to clean up after herself in a restroom shared with her co-workers and then blaming them for some sort of conspiracy against her in even claiming there was a problem is evidence of a failure to maintain a satisfactory working relationship with her co-workers. She violated CSR §16-51 A. 4).

The violations under CSR §§16-50 A. 20) and 16-51 A. 11) are dismissed. Specific provisions of both CSR §16-50 A. and CSR §16-51 A. cover Appellant's misconduct. These catchall provisions are redundant and are dismissed.

Appellant claims in her defense that the disciplinary action was discriminatory in nature. As proponent of the claim of discrimination, she must initially establish a *prima facie* case of discrimination by a preponderance of the evidence. *Cone v. Longmont United Hospital Association*, 14 F.3d 526, 529 (10th

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[1] *Miriam-Webster's Collegiate Dictionary*, 10th Ed., 1993
[2] *Black's Law Dictionary*, 4th Ed., 1951

Cir. 1994) However, Appellant presented no testimony or any other evidence of discrimination. The Hearing Officer cannot make a finding based upon the Appellant's own gut feelings and inferences or vague claims of a "clique." There must be credible, substantiated, tangible evidence for the Hearing Officer to find discrimination. No such evidence has been presented. The discrimination claims are dismissed.

The last issue before the Hearing Officer is the appropriate level of discipline given the allegations proven by the Hospital. In determining the appropriateness of the discipline imposed by Ms. Gillman, the Hearing Officer has looked at Appellant's behavior during the hearing, her refusal to admit she engaged in the conduct despite the overwhelming evidence to the contrary, her vagueness in response to questions during cross-examination, and her attempts to shift blame from herself to a clique of co-conspirators who wanted her out of the building. The Hearing Officer notes that Appellant was once the infection control officer for the Hospital and the irony that this conduct occurred in a hospital, a place where people should be more aware of public health issues, not less. The Hearing Officer has also considered Appellant's past disciplinary history. She has both a Written Reprimand and a Verbal Warning. Based upon all the information presented during the hearing and the gravity of the conduct, the Hearing Officer concludes that suspension is appropriate. Because Appellant is an exempt employee, the shortest period of time for which she can be suspended is one week.

ORDER

Therefore, for the foregoing reasons, the Hearing Officer MODIFIES the disciplinary action as follows: the Hospital's determination that Appellant violated CSR §§16-50 A. 14) and 16-51 A. 4) and 8) is AFFIRMED; the Hospital's determination that Appellant violated CSR §§16-50 A. 2) and 10) and 16-51 A. 11) is REVERSED. Appellant's one-week suspension is AFFIRMED and the request to be reinstated and to recover back pay and benefits is DENIED. This Appeal is DISMISSESD with prejudice.

Dated this 31st day of May 2002.

Robin R. Rossenfeld
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 AND ORDER by depositing the same in the U.S. mail, this 3RD day of June 2002, addressed to:

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2435 Williams Street
Denver, CO 80205

Michael J. O'Malley, Esq.
1444 Stuart Street
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Mark Wiletsky, Esq.
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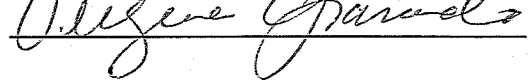
I further certify that I have forwarded a true and correct copy of the foregoing FINDINGS AND ORDER by depositing the same in interoffice mail, this 3RD day of June 2002, addressed to:

City Attorney's Office
Employment Law Section

Dr. Patricia Gabow
Denver Health and Hospital Authority

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