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

Consolidated Appeal Nos. 395-01, 25-02, 76-02, 84-02

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 "DHHA" or "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 May 6-8, 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:

Thomas George, Mary Gillman

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

Appellant, Joyce Montoya, Cynthia Castaneda

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

Exhibits 1 – 3, 5-25, 27-29, 31-33

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

A, B, D (pp. 1-3), I, J

The following exhibits were admitted into evidence by stipulation:

Exhibits 1 – 3, 5-25, 27-29, A, B, I, J

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

None

NATURE OF APPEAL

Appellant is appealing three "Below Expectations" Performance Enhancement Program Reports ("PEPR") and her termination from employment for alleged violations of CSR §§16-50 A. 1), 2), 7), 19) and 20) and 16-51 A. 2), 5), 6), 7), 8), 10) and 11). She alleges race, color, sex, age and creed discrimination in the issuance of the first two PEPRs. She is seeking "Meets Expectations" PEPRs, reinstatement to her job, restoration of back pay and benefits, and removal of associated documents for her personnel file.

ISSUES ON APPEAL

Were the determinations that Appellant's performance was "Below Expectations arbitrary, capricious, and without rational basis or foundation?

Was the December 2001 "Below Expectations" PEPR issued prematurely?

Did Appellant violate CSR §§16-50 A. 1), 2), 7), 19) and 20) and 16-51 A. 2), 5), 6), 7), 8), 10) and 11)?

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

Were the Hospital's decisions to find Appellant's performance "Below Expectations" in November and December 2001 discriminatory?

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 Appeal No. 395-01 (grievance appeal of "below expectations" rating on annual Performance Evaluation Plan Review), CSA Appeal No. 25-02 (grievance appeal of "below expectations" ninety-day interim PEPR) and CSA Appeal No. 07-02 (one week suspension for various violations of CSR §§16-50 and 16-51). The parties sought clarification as to which matter was to be heard at the hearing scheduled for March 19 and what issues would be addressed by each appeal.

During the prehearing conference, the Hearing Officer initially ruled that the ninety-day interim PEPR appeared to be premature since it was issued less than ninety days after the annual PEPR was completed and that it should be dismissed. At a second prehearing conference on April 30, the Hearing Officer indicated that she was re-instating the appeal for CSA Appeal No. 25-02, that she would take evidence about the

first nine-day interim PEPR, and would determine, as part of this case, whether that interim PEPR was premature or whether it was properly issued and, therefore, could be considered as part of the basis for Appellant's eventual termination for a violation of CSR §16-50 A. 19).

The Hospital indicated that the second interim PEPR was about to be done. It was agreed that, if the second interim PEPR was also "Below Expectations," the parties would act promptly on the grievance and, that, if Appellant did not receive satisfaction from the Hospital, that judicial economy would be served by consolidating it with the other PEPR matters. The hearing was set for May 6-8 in order to give the parties the time necessary to complete the internal grievance procedure, if that became necessary. Appellant did receive a second "Below Expectations" PEPR on March 29. She grieved it and appealed the grievance denial on April 12, 2002 (CSA Appeal No. 76-02).

The Hospital terminated Appellant from her employment on April 16, 2002. On April 22, the Hospital requested a second prehearing conference to discuss consolidating the termination appeal with the grievance appeals. The Hospital also requested additional time to submit an amended prehearing statement that added the exhibits and witnesses in support of the termination. A second prehearing conference was held on April 30. At that time, the Hearing Officer re-instated CSA Appeal No. 25-02 (see above), granted the Hospital's unopposed motion to add the termination appeal (CSA Appeal No. 84-02) to the matters heard on May 6 – 8, and granted the extension of time to file amended prehearing statements and exchange the remaining exhibits to May 2.

FINDINGS OF FACT

1. Appellant was employed by the Hospital for approximately 15 years. Over the course of her career at the Hospital, Appellant had served in a number of capacities, including training director, acting personnel director, and disease prevention and control coordinator. She has an MBA and is currently working towards a doctorate in divinity. At the relevant time, she was classified as a Program Administrator, working under Mary Gillman, Operations Coordinator. She had two on-going assignments. Her primary responsibility was to prepare the Health Professional Shortage Agency ("HPSA") grants. She was also responsible for reviewing and making changes in the computer for the primary provider information for each patient.

2. Although the assignment to write the HPSA grants was a new assignment, Appellant had prior experience working with grants. From approximately 1994 through 1996, she served as Health Promotion Coordinator for the Hospital. She worked with all eighteen community health sites and departments on the main Hospital campus. She worked with national, state and regional health prevention organizations. She was in charge of a major re-engineering of community health services.

3. 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. Those violations included CSR §16-51 A. 5 (failure to observe departmental regulations, to wit: Denver Health Employee Principles and Practices #4-118, Electronic Mail) and CSR §16-51 A. 7) (formerly CSR §16-23 12)), unauthorized operation or use of any vehicles, machines, or equipment of the City and

County (to wit: use of the Hospital computer for personal purposes). (*See CSA Appeal No. 96-99* and Exhibit 32).

4. Appellant returned to work on September 27, 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.

5. 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. They would remain in contact through e-mails, by telephone and by occasional visits by Ms. Gillman to Appellant's office. Frequently when Ms. Gillman visited Appellant in her office, she would find that the computer was not on and Appellant reading a book or newspaper, answering her personal mail, listening to her headphones, or otherwise not occupied with her work. This lead Ms. Gillman to instruct Appellant not to bring books, newspapers and other distractions into the office.

6. On October 10, 2000, Appellant was issued a verbal warning for refusing to follow the orders of an authorized supervisor or do assigned work which the employee is capable of performing (CSR §16-50 A. 7)), unauthorized absence from work (CSR §16-50 A. 13)), failure to observe departmental regulations (CSR §16-51 A. 5)), and failure to comply with the instructions of an authorized supervisor (CSR §16-51 A. 10)), for her failing to appear on the day scheduled to be her day to return to work (September 26, 2000), for failing to follow procedures regarding a sick call on October 6, 2000, and for taking an unauthorized break on October 10, 2000. (*See* Exhibit 33).

7. HPSA is a Federal grant that supplies medical, dental and mental health personnel to areas with insufficient practitioners within a defined area. In order to qualify under the grant, the health care center must establish that residents within a particular area do not have access to a sufficient number of practitioners within a reasonable distance/commute time. If an area qualifies for HPSA designation, the community providers, such as the Hospital, can attract practitioners by giving practitioners relief on their student loans.

8 The requirements for the applications are very detailed and very specific. The methodology is included in the HPSA training manual, which had been given to Appellant when she started the assignment. Appellant needed to group and disqualify the contiguous areas to the proposed service areas by using census tracts in order to show need. The information that needed to be included was population, ethnic breakdowns, (low) income, homeless rates, and percentage at or below Federal poverty levels. The CLARITAS database, which deals with such census data, is the authorized source for this information (the US Census Bureau recently established a site that provides this information, which can also be used.) No extraneous data or non-CLARITAS based information is acceptable; the HPSA Program does not want to know other information about a particular community, including its history, level of education, number of single-parent families, etc.

9., Appellant was given the HPSA manual her first week back. She was asked if she understood the information and whether she needed help. She indicated to Ms. Gillman that she understood the manual.

10. Appellant was expected to access CLARITAS by the Internet. The only

other Internet sites she needed to perform her job was the RTD site so that she could obtain bus route and commuting time information and the Maps-are-us site for detailed maps.

11. Appellant was responsible for preparing two Dental HPSA Applications and the La Casa Medical HPSA renewal.

12. On June 25, 2001, Appellant met with Ms. Gillman and Colleen Lamprun, who had prior Dental HPSA experience with Colorado Community Health Network. During that meeting, Appellant began the discussion by stating the Eastside Clinic Area did not qualify as a Dental HPSA. In an August 10, 2001, memo to Appellant, Ms Gillman noted that Appellant was negative in her approach to the Hospital's goals and objectives. She was warned that she needed to change her communication style in order to be perceived as a team player. (*See* Exhibit 1). Ms. Gillman went on to write:

> As per discussion that Jim (Garcia) and I had with you regarding the content of the HPSA Applications you completed recently, it is imperative that you only include statements and commentaries on that are substantiated by proper sources, and be able to document the source of the statements. All unsubstantiated or subjective opinions should not be incorporated into your work and will be considered unacceptable in the future.
>
> Due to considerable confusion caused by multiple individuals from Denver Health contacting the State Department of Health Services, CCHN (Colorado Community Health Network) Representative, and Federal Division of Shortage Designation Representatives, the decision has been made to identify that all future verbal and written contact with these organizations will originate out of the Community Health Services Executive Staff office unless delegated specifically by Dr. Richard Wright to another individual. This will ensure that all communication is streamlined and concise. There, should you require information from any of these organizations or have questions regarding the HPSA application process, you should follow the chain of command and contact myself first, and Jim Garcia in my absence.

13. On July 18, 2001, Dr. Richard Wright, Director of Community Health Services, sent a copy of the Eastside Dental HPSA Application to Bronwyn Shaffer, Primary Care Office, Denver Department of Health and Environment, for review and comment before the final product was submitted. Ms. Shaffer returned the draft with several comments about what should and should not be included in the document (*See* Exhibit 7.)

14. Ms. Gillman included a reference to these comments and corrections in the August 10 memo to Appellant.

> It is my expectation that you incorporate the feedback from the Primary Care Office (PCO) on the proper level of documentation and information that constitutes a correctly competed HPSA Application into all of your future work on HPSAs. The finalized documents should serve as templates for your future work with the Dental and Medical HPSA

> Applications for Denver Health. Through the editing of your original application by the PCO, it is my expectation that you future work have the level of clarity and specificity that is outlined by the feedback from the PCO and that which will be contained in the final document that will be sent to the Division of Shortage Designation in Washington. It is our expectation that following the finalization of these original applications with the input from the PCO, your work products in the future will not require the re-working by the Primary Care Office, unless there are changes in the HPSA Application Guidelines.

Exhibit 1, p. 2.

15. The August 10 memo also contains a reference to the fact that Appellant had been sending faxes to Ms. Gillman upside down, resulting in "blank" pages being faxed. According to Appellant, she had been sending faxes to Ms. Gillman that had not been replied to; Ms. Gillman thought that the faxing of the "wrong" side of the documents explained why she never received and responded to the documents.

16. Appellant filed a grievance against Ms. Gillman on August 29, 2001. In that grievance, Appellant complains about her treatment since her return to the Hospital a year earlier, including the location of her office, restrictions in her access to meetings, forums, activities, events and celebrations, limitations placed upon her about bringing personal items into her office, alleged surveillance during and after work hours, broken furniture, broken computer and keyboard, complaints about Ms. Gillman's conduct, and her perception that she was being threatened with her next performance evaluation for problems she did not see as her fault. (Exhibit 2).

17. During the hearing Appellant admitted that her claims in the grievance that Ms. Gillman yelled at her for hours was an exaggeration. She stated that she is a very quiet person and that she considered Ms. Gillman coming into her office and not saying "hello" before asking about work to be "yelling" and unprofessional.

18. Appellant's witness, Cynthia Castaneda, had a cubical next to Appellant's office. She testified that she never heard Ms. Gillman yelling at Appellant or any raised voices coming from Appellant's office.

19. Ms. Gillman responded to the grievance at Step One, despite the fact that she was out on emergency medical leave. In this September 7, 2001, response, Ms. Gillman restated her expectations for Appellant in performing her work and addressed the equipment "problems" raised by Appellant. (Exhibit 3). During the hearing, Ms. Gillman testified that she had not been aware that Appellant suffered form carpal tunnel syndrome until she received the grievance.

20. Appellant sent a copy of what was supposed to be a close-to-final draft of the renewal application for the LA Casa HPSA grant, as well as the Eastside Dental HPSA Application to Jodi Drisko, Quality Improvement Coordinator for the Hospital's Community Health Services for comment. Ms. Drisko reviewed the draft. She noted several deficiencies in the application. In a memo dated September 27, 2001, Ms. Drisko wrote to Ms. Gillman:

> While reviewing the La Casa HPSA application renewal for Ms. Terri

> Garrett, I noticed many inconsistencies with grant guidance. What I though was going to be an editing job, turned into a large task consisting of rewriting and reformatting the entire proposal.
>
> On part of the application as originally written by Ms. Garrett did not meet the requirement for a shortage area (i.e. the ratio of population to providers was too great), so I asked her to redefine the area (contiguous area). I had to be very explicit as to which census tracts should and/or shouldn't be included. She could not make the decision to re-aggregate the census tracts to improve the chances of the application being approved. The majority of census tracts in this same region were already HPSA designated, and if we re-aggregated neighborhoods they would be an already designated HPSA area. Ms. Garrett did not know to look up current HPSA status on the Bureau for Health Professions website, she used the information given to her from the State, which does not show great detail for the Metro Denver area. I had to be very explicit about which census tracts to include and redraw the boundaries on the map. Some of the calculations in the grant application were also incorrect (by a 10 fold order of magnitude).
>
> After I finished with the La Casa HPSA application, we agreed that it would be the template for future applications. Ms. Garrett proceeded to complete the Eastside Dental HPSA application using the redefined template. This application was much better than the La Casa application, but still had quite a bit of room for improvement. Once again, it was not a final edit on my part, but an editing job that one would consider consistent with a first draft of the application. It was my understanding that this application was just about "ready to go."
>
> I believe that the quality of work on these applications is less than desirable for a research associate. Ms. Garrett holds a much higher position and has an MBA, so I would expect a much better product from her and more critical thinking skills. She showed little resolve to try and problem solve on her own, but would rather that I made the decisions and solved the problems concerning the intricacies of the applications.

(Exhibit 5, p. 11).

21. Ms. Gillman testified that the maps attached to the Dental HPSA Application showed three different Denver neighborhoods outlined in blue highlighter. When she told Appellant to mark each neighborhood with a different color, Appellant told Ms. Gillman that she knew the difference between the neighborhoods. Ms. Gillman told Appellant that they did not know the different neighborhoods in Washington, D.C., and that she had to re do the map.

22. The draft of the Eastside Dental HPSA that had been provided to Ms. Drisko contained information that was not supported by the census data and was irrelevant personal commentary, such as the Park Hill neighborhood is "a bedroom community known for its period architecture and blended ethnic texture." (*See* Exhibit 5).

23. Ms. Gillman testified that it should not have taken Appellant twelve to fifteen months to complete the HPSA Application. According to Ms. Gillman, Appellant should have been able to complete the application within three or four months of receiving the CLARITAS data. The guidelines are clear-cut and identify the step-by-step process for completion of the application.

24. Ms. Gillman testified that one of her purposes for sending the August 10 memo was to give Appellant notice of possible performance deficiencies prior to the issuance of Appellant's formal annual PEPR.

25. Appellant's PEPR anniversary date was September 27, 2001. Ms. Gillman was out on emergency medical leave and did not return to full-time work until late October/early November. Therefore, Appellant was not given her annual PEPR until November 14, 2001. She received a "Below Expectations" evaluation. (Exhibit B). Appellant grieved this evaluation in a timely manner. The grievance was denied at both steps one and two. Appellant filed the appeal for the "Below Expectations" PEPR with the Hearing Officer in a timely manner on December 27, 2001. (CSA Appeal No. 395-01).

26. After Appellant was issued the "Below Expectations" evaluation, her duties were narrowed so that she could concentrate on completing the Dental HPSAs and improving her performance. Her ability to attend meetings or contact fellow employees or others about her work was severely limited.

27. A ninety-day PEPR was performed, pursuant to CSR §13-41, on December 17, 2001. Appellant received a "Below Expectations" PEPR at that time. (Exhibit I). Appellant grieved the evaluation in a timely manner. The grievance was denied at both steps one and two. Appellant filed her appeal with the Hearing Officer in a timely manner on February 7, 2002. (CSA Appeal No. 25-02).

28. A second ninety-day PEPR was performed on March 18, 2002. Appellant received a "Below Expectations" PEPR at that time. (Exhibit J). Appellant grieved the evaluation in a timely manner. The grievance was denied at both steps one and two. Appellant filed her appeal with the Hearing Officer in a timely manner on April 11, 2002. (CSA Appeal No. 76-02).

29. Denver Health Employee Principles and Practices #4-115 (effective January 15, 1998) concerns personal telephone use. It provides, in relevant part:

> Principle:
>
> During working time, Denver Health employees have as their primary concern the performance of their work for the benefit of our patients and the organization. Therefore, employees are discouraged from placing or receiving personal telephone calls or receiving visitors while on duty.
>
> Practice:
>
> 1. Employees should not use Denver Health telephones to conduct personal business.

2. Personal telephone use should be conducted during "off duty" personal; times such as breaks and meal periods. The receiving or placing emergency calls is understandable. No personal long distance calls should ever be made at Denver Health expense.

4. Excessive use of work time for personal calls will result in Corrective Action/Employee Counseling.

(*See* Exhibit 20).

30. Denver Health Employee Principles and Practices # 4-140 concerns Internet access policy. It provides, in relevant part:

Principle:

To establish principles and practices regarding World Wide Web (WWW) Internet access, through the Denver Health Network, by Denver Health (DH) employees, consultants and contractors (*DH Users*).

A. Definitions:

1. *DH Users* DH employees, consultants and contractors
2. *DH Internet Access: DH Users' access to the World Wide Web (WWW), via DH* network, using desktop browser applications.

B. Philosophy and Intent:

1. Provide Internet access to *DH Users* in order to meet legitimate mission and business needs of the organization.

C. Guiding Principle:

1. Access to the Internet through the DH Network is a privilege. Like any other privilege, it carries with it the responsibility for use in an efficient, ethical and legal manner.

2. "Unacceptable Use" (as defined below) or any activity which endangers the DH Network, or confidentiality of DH information, is a serious violation of this policy.

Practice:

A. *DH Internet Access* shall only be used in a manner consistent with the mission, business and administrative objectives of DH. All activities inconsistent with there objectives are considered to be inappropriate, may jeopardize continued access and may result in correct/disciplinary action.

B. DH reserves the right to examine any user's history of access,

stored information and/or communication resulting from such access at any time...

* * *

Acceptable Use:

As a condition of providing Internet access to *DH Users*, DH places certain restrictions on workplace use of the Internet. DH encourages the following examples of use of *DH Internet Access*:

B. Acquiring information related to, or designed to facilitate the performance of regular assigned duties.

Unacceptable Use:

B. *DH Internet Access* should not be used for entertainment or routine personal/social interaction.

Disciplinary Action:

Appropriate disciplinary action for violation of the DH Internet Access Policy may include any of the disciplinary actions provided under DH Authority principles or practices, or Career Service Rules as applicable.

(*See* Exhibit 21).

31. Ms. Gillman requested copies of Appellant's Internet and telephone usage from the Hospital's Information Services in November 2001 and again in February and March 2002, covering the period of October 2001 through March 2002. According to these records, Appellant had several phone calls from approximately ten to thirty minutes in length that were not work related and at least one of them was a long-distance call. (*See* Exhibits 22 and 23). Records also show that she accessed the Internet for sites that were not work related. These include various news and entertainment sites, e-Bay, coolsavings.com and other shopping sites, mybankruptcyforms.com and other court document sites, roots.com, and Remax. Only a few of her Internet "hits" were for the sites she was authorized t use for work purposes (i.e., RTD). (*See* Exhibits 25, 27, 28, 29).

32. Over the course of Appellant's return to employment, Ms. Gillman expressed concern about Appellant' inability to leave a proper message for in-coming calls in the voice mail. Appellant testified that she had unsuccessfully tried to change the voice-mail message several times, but that there was a different procedure for placing a message for internal calls than for external calls. Ms. Gillman testified that the same message used for all in-coming calls and that, when she called Appellant both internally and externally the message was not changed. Appellant finally changed the message on or about March 8, 2002, several months after Ms. Gillman told her to correct it. (*See* Exhibit 16).

33. On April 5, 2002, Appellant was give notification of contemplation of discipline for violations of CSR §§ CSR §§16-50 A. 1), 2), 7), 19) and 20) and 16-51 A. 2),

5), 6), 7), 8), 10) and 11). (Exhibit 18). The predisciplinary meeting was scheduled for April 15, 2002. After that meeting, on April 16, Appellant was served with a notice of termination. (Exhibit 19) Appellant filed her appeal of her termination with the Hearing Officer on April 25, 2002, (CSA Appeal No. 84-02).

34. Appellant received a written reprimand pursuant to the July 17, 2000, order of the Hearing Officer for conduct in August 1999, on October 3, 2000. (Exhibit 32). She received a verbal warning on October 10, 2000, for conduct in September and October 2000. (Exhibit 33). She was suspended for one week, effective January 21, 2002, for conduct in October 2001. The Hearing Officer affirmed that suspension on May 28, 2002. (*See CSA Appeal No. 07-02*).

DISCUSSION AND CONCLUSIONS OF LAW

Applicable Rules and Statutes[1]

CSR Rule 13 governs Performance Enhancement Program Ratings. It provides, in relevant part:

§13-10 Purpose

> The evaluation of an employee's performance is intended to assist the employee in becoming a more effective worker. This evaluation is designed to inform the employee of the manner in which he or she is meeting standards of performance established by the supervisor. In no event shall an employee's employment performance rating be a substitute for disciplinary action under Rule 16 DISCIPLINE. It may be used, however, to establish attempted non-disciplinary corrective action in support of subsequent disciplinary action under Rule 16 DISCIPLINE for unsatisfactory work performance. The Performance Enhancement Program Report is intended to cover overall performance during a specific period of time.

§13-20 Performance Reporting Requirement

§13-22 Performance Reporting requirement Following End of Probation

> Every employee holding an unlimited or limited full-time or part-time position...shall have his or her performance formally evaluated at least once a year and a report on this performance submitted to the Career Service Authority. This report shall be submitted by the appointing authority in accordance with the procedure and form or forms prescribed by the Personnel Director.

§13-22 Levels of Performance

[1] In her Notices of Appeal, Appellant cites various alleged Rule violations. Some of the Rules cited do not exist (i.e. §15-50-3) or are not relevant to this proceeding (i.e., Rules 8 and 10). They will not be included here.

An employee's performance shall be rated according to the following criteria:

Outstanding – Consistently exceeded expected accomplishments of the job and made a major contribution to the agency.

Exceeds Expectations - Consistently exceeded expected accomplishments of the job.

Meets Expectations – Consistently met expected accomplishments of the job.

Below Expectations – Employee failed to meet a significant portion of the employee's expected accomplishments.

§13-24 Documentation of Rating

Whenever the overall evaluation of a Performance Enhancement Program Report is "Outstanding," "Exceed Expectations" or "Below Expectations" documentation specifically detailing the reason(s) for the rating shall be provided to the Career Service Authority.

Failure to provide such documentation shall result in the evaluation being returned to the appointing authority.

§13-40 Below Standard Ratings

§13-41 Quarterly Reports

Whenever the overall evaluation of a Performance Enhancement Program Report is "Below Expectations," an additional report shall be required at the end of three (3) month's time and each three (3) months thereafter until the employee has achieved a rating of "Meets Expectations" or above.

§13-50 Grievances and Appeals Relating to Performance Enhancement Program Reports

An employee may file a grievance pursuant to Rule 18 GREIVANCE PROCEDURE, and may appeal that grievance in accordance with Rule 19 APPEALS, insofar as it relates to Performance Enhancement Program Reports, but may not grieve or appeal the Performance Enhancement Program, as such.

§13-60 Procedure When Anticipated Rating Will Be Lower Than "Meets Expectations"

If the anticipated rating is lower than "Meets Expectations," the agency shall advise the employee of the anticipated rating a reasonable time in advance, but in no event less than two (2) working days, and shall allow representation at the meeting to review the Performance Enhancement Program Report in accordance with Section 17-20 Representation.

§13-70 Effect of Late Fillings of Performance Enhancement Program Reports

Failure to file Performance Enhancement Program Reports within sixty (60) days of the due date results in a freeze on personnel requisitions as provided for in Subsection 4-22 Effect of Late Performance Enhancement Program Report.

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.

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.

7) Refusing to comply with the orders of an authorized supervisor or refusing to do assigned work, which the employee is capable of performing.

19) Failure to meet established standards of performance in three successive rating periods.

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.

2) Failure to meet established standards of performance including either qualitative or quantitative standards.

5) Failure to observe departmental regulations.

6) Carelessness in performance of duties and responsibilities.

7) Unauthorized operation or use of any vehicles, machines, or equipment of the City and County.

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

10) Failure to comply with the instructions of any authorized supervisor.

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 ...

e) Grievance of Performance Enhancement Program Reports: If the grievance of Performance Enhancement Program Report is appealed to the Career Service Hearing Officer, the only basis for reversal of the Performance Enhancement Program Report shall be an express finding that the rating was arbitrary, capricious, and without rational basis or foundation. If such an express finding is made, the Hearing Officer shall require the department to issue a new Performance Enhancement Program Report in conformance with the Hearing Officer's decision.

* * *

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)

Appellant has the burden of proof on the PEPR grievances and her discrimination and harassment claims. The Hospital has the burden of proof with regard to the disciplinary determination (termination from employment).

PEPRs

Appellant claims that the PEPRs violated various provisions of CSR §§16-50 and 16-51. These Rules are disciplinary in nature. They do not create an affirmative right on behalf of an employee. Therefore, these allegations are dismissed for failure to state a claim.

The basis for the Hearing Officer's jurisdiction for "Below Expectations" PEPRs rests in CSR §19-10 e). The Rule provides that the only basis for reversal is if the rating is "arbitrary, capricious, and without rational basis or foundation."

The Hearing Officer has carefully reviewed all the evidence presented during this hearing. As set out further below, there is substantial evidence in the record that Appellant's work performance for the year ending September 2001, and during the subsequent ninety-day review periods, rose to the level of gross negligence or willful misconduct, that she refused to follow instructions of her supervisor, and that she was unable to work successfully with co-workers (as evidenced by the behaviors underlying her disciplinary suspension in January 2002, which was affirmed by the Hearing Officer in CSA Appeal No. 84-02 on May 28, 2002), or outsiders. She was frequently argumentative and defensive, as evidenced by her numerous e-mails and memos to Ms. Gillman. Dr. Wright required that all HPSA inquiries be directed through Ms. Gillman or Jim Garcia because Appellant's responses were not in line with the Hospital's goals and objectives. Three persons outside Appellant's line of supervision (and two of them from outside agencies), Bronwyn Shaffer, Primary Care Office, Denver Department of Health and Environment, Colleen Lamprun Colorado Community Health Network, Jodi Drisko, Quality Improvement Coordinator for the Hospital's Community Health Services, complained about Appellant's work product and inability to complete the HPSA applications properly. There is no evidence that Appellant made any effort to improve her performance deficiencies after the issuance of any of the PEPRs. Instead, Appellant performed her more limited duties at the same level, if not worse. Based upon all the evidence submitted, the Hearing Officer concludes that all three "Below Expectations" PEPRs are not arbitrary or capricious and are supported by a rational basis or foundation.

Appellant's argument that she could not be expected to meet expectations for either of the ninety-day interim PEPRs because many of her duties had been taken away from her, so that she did not meet with co-workers, other than Ms. Gillman, or with outside agencies or customers, is disingenuous. Appellant's responsibilities were limited because, as the evidence presented at the hearing suggested, her supervisors wanted her to concentrate on and improve upon the more important aspects of her work. If she was barred from performing a function, it means that she was unable to perform it at a

satisfactory level.

The only real question is whether the second PEPR, the one issued in December 2001, is premature because it was issued ninety days after the anniversary date, not ninety days from actual issuance.

This question was previously addressed by the Hearing Officer in *In the Matter of the Appeal of Mary L. Schafer*, CSA Appeal No, 123-98. It is exactly on point. Ms Schafer argued that CSR §13-41, which requires a quarterly review to occur three months after a "Below Expectations" evaluation, should be read to run from the date of the PEPR meeting, not the last date of the period under review. Ms. Schafer argued that such a reading was necessary in a case such as this when the PEPR meeting occurred almost two full months after the end date for the prior review. She argued that it was unfair that she should be required to make improvements in her performance when she did not know for two-thirds of the time included in the ninety-day interim PEPR that her performance did not meet expectations or, presumably, how to improve. The Agency in that case argued that CSR §13-41 required the quarterly review after a "below expectations" PEPR runs from the end of the period under review. Like Appellant, Ms. Schafer knew that there were concerns about her work prior to the original PEPR; she had notice of the possible deficiencies in her performance and knew how to correct them. Like Appellant, Ms. Schafer was an experienced employee. She should have been aware what was expected of her, even without the PEPR in hand, and made the necessary improvements.

> To determine intent, one must first look to the statutory language and give words and phrases their plain and ordinary meaning. *See Climax Molybdenum Co. v. Walter*, 812 P.2d 1168, 1173 (Colo. 1991). If the language of the statute is plain and unambiguous, there is no need to reach beyond that language to determine intent. *See Mason v. People*, 932 P.2d 1377, 1380 (Colo. 1997). Courts should not interpret a statute or ordinance to mean that which it does not express. *Rancho Colorado, Inc. v. City of Broomfield*, 196 Colo. 444, 586 P.2d 659 (1978). *See also Sandomire v. City and County of Denver*, 794 P.2d 1371 (Colo.App. 1990).
>
> The plain meaning of the language of CSR §13-41 is that it requires <u>quarterly reviews</u> after a "below expectations" PEPR until the employee's performance improves to meet expectations. The fact that the PEPR meeting is more than fifty days after the end of the performance period does not change this timing, just as it would not reset the annual review back two months. If this weren't the case, then annual performance reviews would become "approximately annual reviews" and employees would not know when they were subject to formal review. That is clearly not the evaluation system the CSA Rules contemplates. Therefore, the Hearing Officer finds that, based upon the plain meaning of CSR §13-41, the quarterly evaluation ran from the end date of the prior evaluation period, or from April 1 through July 1, 1998.

Ibid, at page 12.

The Hearing Officer reaffirms her decision in the *Shafer* appeal. Appellant had notice of what was expected of her and what her probable performance deficiencies were

when she received the August 10 memo from Ms. Gillman, as well as Ms. Gillman's September 7 response to Appellant's August 27 grievance. The fact that she did not receive the formal PEPR evaluation until November does not mean that she had an excuse not to improve her performance while her supervisor was out on emergency medical leave. The first ninety-day interim PEPR is therefore found to have been properly issued and not premature.

Because the first ninety-day interim PEPR was not premature, the second ninety-day interim PEPR, which was issued ninety days later, was also not premature.

Termination from employment

In the notice of termination, Appellant was been charged with violating several provisions of CSR Rule 16. The first of those, and perhaps the most serious allegation, is she violated CSR §16-50-A. 1), "gross negligence or willful neglect of duty."

Because none of these terms is defined in the CSR, the Hearing Officer must look elsewhere for their definitions. They are terms well-defined in the law. Negligence does not require intent. It is commonly defined as the 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.2d730 (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. 483, 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 125 (1976); *Drake v. Albeke*, 188 Colo. 14, 532 P.2d 225 (1975).

"Gross" has been defined as "immediately obvious" or "glaringly noticeable usually because of inexcusable badness or objectionableness."[2] *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.[3]

"Gross negligence" is defined by *Black's* 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)[4]

In other words, "gross negligence" does not require that the Hospital show that Appellant intentionally acted in a wrongful manner, just that she performed her work in a manner that was more than careless or inadvertent and that the failure to perform the work

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

was obviously unreasonable or inappropriate.

On the other hand, "willful neglect" implies that the wrongful conduct was intentional or conscious, not merely negligent. "Willful" is generally defined as "obstinately and often perversely self-willed; done deliberately."[5]

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. (Cite omitted.)[6]

Appellant is also charged with violating a related provision, CSR §16-51 A. 6), "carelessness in performance of duties and responsibilities." This provision is distinguishable from CSR §16-50 A. 1) in that it does not require either the reckless disregard of the consequences or the intentional performance failures that are necessary to establish either "gross negligence" or "willful neglect."

Most important for the Hearing Officer in deciding whether Appellant's failures were gross negligence and/or willful neglect or were just due to carelessness, was Appellant's testimony about herself. She testified that she has worked for the Hospital for over 15 years. She is an experienced administrator, having served in a number of capacities, including training director, acting personnel director, and disease prevention and control coordinator. She has an MBA. Although the assignment to write the HPSA grants was a new assignment, Appellant had prior experience working with grants. From approximately 1994 through 1996, she served as Health Promotion Coordinator for the Hospital. She worked with all eighteen community health sites and departments on the main Hospital campus. She worked with national, state and regional health prevention organizations. She was in charge of a major re-engineering of community health services.

This means that Appellant knew or should have known how to read the HPSA Manual and complete the two Dental HSPA applications and the La Casa Medical HPSA renewal within a reasonable period of time, that being, if not within three or four months of receiving the data, as Ms. Gillman said she expected, something considerably less than the year to fifteen months Appellant spent. As Ms. Drisko wrote to Ms. Gillman:

> I believe that the quality of work on these applications is less than desirable for a research associate. Ms. Garrett holds a much higher position and has an MBA, so I would expect a much better product from her and more critical thinking skills. She showed little resolve to try and problem solve on her own, but would rather that I made the decisions and solved the problems concerning the intricacies of the applications.

Exhibit 5, p. 11.

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[5] *Miriam-Webster's, op cit.*
[6] *Black's, op cit.*

Appellant's failures cannot be attributed to a lack of training or experience. They can only be attributed either, at a minimum, to Appellant performing her work at a level that was obviously unreasonable or inappropriate ("gross negligence") or, even worse, to a purposeful or willful performance of her duties at an intentionally substandard or inappropriate level ("willful neglect"). Either way, Appellant violated CSR §16-50 A. 1).

Because the evidence shows that Appellant's performance failures were due to more than mere carelessness, the Hearing Officer is dismissing the allegation that Appellant violated CSR §16-51 A. 6).

Appellant is charged with theft, destruction or gross neglect in the use of City property. As the Hearing Officer ruled in *In the Matter of the Appeal of Terri Garret McCarley*, CSA Appeal No. 07-02, 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 uses a telephone and accesses the Internet for personal use. As there was no testimony that Appellant stole, destroyed or otherwise deprived the City of use of any of its property, the allegation of a violation of CSR §16-50 A. 2) is dismissed.

Similarly, the violation of CSR §16-51 8) is dismissed. There is no evidence that Appellant was negligent in her care or use of City and County property.

Appellant is charged with violating CSR §16-50 A. 7), failure to comply with the orders of her authorized supervisor and refusing to do assigned work which she is capable of performing. She is also charged with violating CSR §16-51 A. 10), failure to comply with the instructions of an authorized supervisor. The record is replete with examples of Appellant's refusal to comply with Ms. Gillman's instructions and her failure to do the assigned work. The proffered explanations for her failures to follow Ms. Gillman's instructions are not legally valid excuses. The Hearing Officer concludes that Appellant has violated CSR §§16-50 A. 7) and 16-51 A. 10).

Appellant is charged with violating CSR §16-50 A. 19), failure to meet established standards of performance in three successive rating periods and §16-51 A. 2), the failure to meet established standards of performance. These provisions are not dependent upon the finding of gross negligence or willful neglect of duty. These two provisions deal with qualitative or quantitative standards that are contained in PEPRs and similar documents.

The violation of CSR §16-50 A. 19) was made out as Appellant's September 2001 and two ninety-day interim PEPRs were all "Below Expectations." However, even if only two of the three the PEPRs are valid (*i.e.*, the December interim PEPR was issued prematurely), the Hospital has established Appellant violated CSR §16-51 A. 6). These two violations are affirmed.

Appellant is charged with violating departmental regulations, to wit: Hospital Principles and Practices #4-115 concerning personal telephone use and #4-140 concerning internet access, a violation of CSR §16-51 A. 5). The same facts are used to support the allegation that Appellant engaged in the unauthorized operation of City machines or equipment, a violation of CSR §16-51 A. 7).

The evidence submitted by the Hospital shows that Appellant was using the telephone for personal use, including making long distance calls, in violation of the Hospital's policy. The evidence also shows that Appellant was accessing the Internet for things other than the web sites that were specifically related to the performance of her job. Even though there was testimony that some of the "hits" made while Appellant was on the Internet may have been caused by "pop-ups" while she was trying to access something else, there is still sufficient evidence to show that Appellant was using the Internet for entertainment purposes, for shopping, and for locating court document forms not related to her work. The Hospital has established that Appellant engaged in unauthorized use of City equipment and violated the Hospital's policies on the use of that equipment by a preponderance of the evidence. The violations of CSR §§16-51 A. 5) and 7) are affirmed.

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.

Discrimination Claims

Appellant, as proponent of the claim of discrimination, initially must 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 Cir. 1994). Appellant does not need to prove the case by direct evidence of discrimination; indirect evidence is also acceptable. Evidence of discrimination is analyzed under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972); *Perry v. Woodward*, 199 F.3d 1126 (10th Cir. 1999), *cert. denied*, 120 S.Ct. 1964 (2000).

Appellant alleged in her Notices of Appeal that the "Below Expectations" PEPRs and her termination were discriminatory and/or harassing in nature. Appellant presented no evidence, either direct or indirect, in support of these allegations. Appellant's contention that Ms. Gillman harassed her by coming into her cubicle and yelling at her "for hours" is an admitted "exaggeration" and not supported by the testimony of Appellant's own witness, Cynthia Castaneda. Likewise, Appellant's statement that she is currently under surveillance and has been followed by investigators employed by the Hospital is not convincing This unsubstantiated claim is insufficient to support her claims of discrimination and retaliation.

Discipline

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 inability to accept responsibility for her actions, her minimization of the effects of her behavior, her evasive responses on cross-examination, her attempts to shift blame from herself to others, including those who do not even work for the Hospital, the similarity to the issues in this disciplinary action and in the disciplinary action that eventually resulted in her reinstatement and the issuance of a written reprimand, (*i.e.,* personal use of the Hospital's computers) and her overall pattern of conduct.

The record shows that Appellant has been given second, third and fourth chances,

both from the Hearing Officer who ordered her reinstated in 2000 and by Ms. Gillman, who had no history with Appellant prior to her reinstatement and who worked with Appellant for over a year to help her complete her work in a satisfactory manner. Appellant instead ignored the assistance of others, acted inappropriately towards her supervisor, and literally chose to read a newspaper instead of perform her job. Appellant is a bright woman, a former high-ranking administrator for the Hospital, including serving a term as the acting human resources director. She was either unable or unwilling to perform a job that a research assistant, a person of lower title and experience than Appellant, should have easily performed. Even without the three "Below Expectations" PEPRS, the record justifies her termination from employment with the Hospital as appropriate. The discipline of termination is affirmed.

ORDER

Therefore, for the foregoing reasons, the Hearing Officer AFFIRMS the three "Below Expectations" PEPRs as they are not arbitrary or capricious and have a rational basis and foundation. The Hearing Officer MODIFIES the disciplinary action as follows: the Hospital's determination that Appellant violated CSR §§16-50 A. 1), 7) and 19) and 16-51 A. 2), 5), 7) and 10) is AFFIRMED; the Hospital's determination that Appellant violated CSR §§16-50 A. 2) and 20) and 16-51 A. 6), 8), and 11) is REVERSED. Appellant's termination from employment is AFFIRMED and the request to be reinstated and to recover back pay and benefits is DENIED. The consolidated appeals are DISMISSESD with prejudice.

Dated this 3rd day of July 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 July 2002, addressed to:

Terri Garrett McCarley
2435 Williams Street
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Michael J. O'Malley, 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 July 2002, addressed to:

Office of the City Attorney
Employment Law Section

Office of General Counsel
Lynn Segretti, Esq.
Denver Health and Hospital Authority

Dr. Patricia Gabow
Denver Health and Hospital Authority

Virginia Granado