

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

Appeal No. 351-01

ORDER

IN THE MATTER OF THE APPEAL OF:

CATHY MOLLENDOR, Appellant,

v.

Agency: The Department of Human Service and the City and County of Denver, a
municipal corporation.

This matter is before the Hearing Officer on Appellant's Motion to Dismiss Termination, which was filed with the Hearing Officer on November 8, 2001. The Agency filed its Response on November 19, 2001. Being fully advised of the matter herein, the Hearing Officer finds as follows:

Applicable Rules

CSR §16-40 provides, in relevant part:

Section 16-40 Disciplinary Action Following Pre-disciplinary Meeting

- A. When Taken: Disciplinary action based on the pre-disciplinary meeting and other pertinent information obtained by the appointing authority or designee shall be taken within fifteen (15) calendar days after the meeting. However, if an appointing authority presents to the Personnel Director documented extenuating circumstances requiring additional time, the Personnel Director may extend the date for taking disciplinary action for **an additional ten (10) calendar days**. A request for an extension of time must be sent to the Personnel Director prior to the expiration of the fifteen (15) day time period and a request for extension of time is not timely submitted to the Personnel Director, **the agency must repeat the steps contained in section 16-30** before disciplinary action may be taken. (Emphasis added)

Relevant Facts

For the purposes of this decision, the following facts are deemed to be true:

Appellant worked for the Agency as a Program Case Manger. On May 15, 2001, Appellant requested Family Medical Leave, retroactive to May 9, 2001. The Agency

subsequently received a Certification of Health Care Provider. On June 8, the Agency sent Appellant notification that her request for FMLA leave was granted as requested. Appellant was instructed to provide the Agency with reports every 30 days indicating whether her intent to return to work had changed. She was also informed that she would be required to present a fitness for duty certificate prior to being restored to employment.

On July 16, after 12 weeks of leave, Appellant was contacted by Paul Sienkiewicz, a member of the Human Resources Department, regarding her return to work. Appellant told Mr. Sienkiewicz that another Agency employee, Christine Lathrop, told her that her FMLA leave would expire on August 3, 2001. Appellant stated that she had a doctor's appointment the following day and would provide information to Mr. Sienkiewicz regarding her work status then. On July 23, the Human Resources Department received a fax from Appellant's physician indicating that she could return to work if she were assigned to a new position. The Human Resources Department contacted Appellant's physician for clarification as to whether Appellant could return to work in her old unit within the Agency. The doctor never responded.

On August 3, Appellant was sent a letter informing her that she was to report to work on August 6. Appellant was warned in that letter that her failure to report to work could result in disciplinary action, up to and including her termination.

Appellant did not come to work on August 6. Instead, she left a message with her supervisor stating that the doctor said that she needed to be reassigned and that, since she was told she had to return to her old assignment, she would not be coming in.

A Notice of Contemplation of Disciplinary Action was sent to Appellant on August 22. This letter informed Appellant that her continued absence from work was allegedly in violation of several provisions of CSR §16-50 and that she was facing discipline up to and including termination.

The pre-disciplinary meeting was held on September 5, 2001, by Dr. Chris Veasey, Manager of the Agency. On or about September 20, the Agency sent a request to Jim Yearby, the Personnel Director, a request for a ten-day extension of time to issue the disciplinary action, pursuant to CSR §16-40 A. Mr. Yearby granted the request on September 21. The Agency filed a request for a second ten-day extension of time on October 1. Mr. Yearby granted the second extension on the same day. The Agency finally issued the Notice of Discipline, informing Appellant of her termination for the alleged violations of CSR §16-50 on October 10, 2001, thirty-five days after the pre-disciplinary hearing had been conducted. This appeal followed on October 19.

Discussion

Appellant has moved to dismiss her termination and requested that the Hearing Officer order her reinstated and be given back pay from May 9, 2001. The Appellant argues that the Agency violated CSR §16-40 A. in that the disciplinary action was not taken with fifteen days of the pre-disciplinary meeting. In the Motion, Appellant claims that the Agency has not presented her (or her counsel) proof of the request for the extensions of time. Further, the Appellant argues, that even if the Agency had made the request and the extensions were granted, the CSR do not provide for two extensions of time.

The Agency has countered by submitting copies of both requests for extension of time, as well as Mr. Yearby's responses. The Agency argues that the first request was made fifteen days after the pre-disciplinary meeting, even though Mr. Yearby did not grant the extension until the sixteenth day, and was timely under CSR §16-40 A. The Agency further argues that nothing in CSR §16-40 A. explicitly prohibits a second request and that, since the second request was filed ten days after the first request, it was timely. As the Notice of Discipline was issued within thirty-five days of the pre-disciplinary meeting, it was timely and the matter should be permitted to proceed to hearing on the merits.

CSR §16-40 A. states that disciplinary action must be taken within fifteen calendar days of the pre-disciplinary meeting. It further provides that the Personnel Director may extend the time "for an additional ten (10) calendar days." The Appellant argues that this language limits the Personnel Director to granting one extension; the Agency argues that the Rule is ambiguous on this point.

The issue before the Hearing Officer boils down to the meaning of the indefinite article "an." The Colorado Court of Appeals found no ambiguity in the use of the word in *Houtz v. Union Insurance Co.*, 865 P.2d 847, 850 (Co. App. 1993), *rev'd other grounds*, 833 P.2d 1057 (1994), stated:

"An" and "a" are forms of the word "one." When used before a noun, "an" or "a" refer to a singular indefinite thing, object or person. "A" seldom denotes plurality, but may refer to plural objects if a modifier, such as "a few" or "a great many" is interposed. 1 *Oxford English Dictionary* 1 (2d ed. 1989); *Black's Law Dictionary* (6th ed 1990); *Random House Webster College Dictionary* (1991).

CSR §16-40 A. permits the Personnel Director to extend the time for "an additional" ten days. Contrary to the Agency's position, the Rule is explicit – it limits the Personnel Director's power to grant one extension only. As the Hearing Officer wrote in *In the Matter of the Appeal of Patricia Kidwell*, CSA Appeal No. 157-99:

To permit the Agency's interpretation of §16-40, permitting additional, and, by implication, unlimited extensions, would have the effect of removing time restrictions on the Agency to take action against an appellant following a disciplinary hearing. This interpretation would lend the chilling effect of *de facto* permanence to the Agency's disciplinary actions. At the same time, the Appellant could not appeal to the Hearing Officer, because there would be no final determination at the Agency level. A suspended appellant would be unable to recoup lost money, at times in substantial amount, pending a decision of the Agency to expand its own deadlines, limited only by the Personnel Director's decisions, ostensibly at some point, to stop granting extensions. A terminated employee would be deterred from seeking other employment where she would be required to divulge whether she was previously terminated, until the Agency stopped seeking extensions, or the Director decided to stop granting them. Such entirely likely outcomes run counter to a plain reading of CSR §16-40, which obviously intends to place a restriction on the time by which the Agency must take disciplinary action.

The Agency did not comply with the requirements of CSR §16-40 A. and issue the disciplinary letter within twenty-five days (fifteen days plus an additional ten days) after the

pre-disciplinary hearing. Therefore, the October 10, 2001, Notice of Discipline is invalid as a matter of law. If the Agency still wishes to discipline Appellant, it must repeat the steps contained in CSR §16-30, including a new pre-disciplinary hearing after seven days notice to Appellant.

Appellant has requested that she be given back pay dating from May 9, 2001, the date that she went out on FMLA leave. The Hearing Officer finds that this issue is not ripe for review. There is nothing in the record before the Hearing Officer that indicates whether Appellant is entitled to any back pay at this time. The remand of this case to the Agency requires a return to the *status quo* at the time of the original pre-disciplinary hearing September 5, 2001. If the Appellant was on leave without pay when the pre-disciplinary hearing meeting was held, then she is not entitled to back pay for the intervening period. If, on the other had, Appellant was still on paid leave, then she is entitled to pay from September 5 forward. If, Appellant is reinstated at the conclusion of the second pre-disciplinary hearing, assuming there is one, and the issue of back pay is not resolved by the Agency, Appellant will have the right to grieve that decision. If Appellant is again terminated from her employment, she may raise the issue of back pay in any subsequent appeals.

Therefore, for the forgoing reasons, this appeal is REMANDED to the Agency for further action in compliance with CSR §§16-30 and 16-40.

Dated this 12th day of December 2001,

A large, stylized handwritten signature in black ink, appearing to read 'RR', is written over a horizontal line. The signature is highly cursive and extends significantly to the right of the line.

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 ORDER by depositing the same in the U.S. mail, this 13th day of December 2001, addressed to:

Cathy Mollendor
611 East Elk Place
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Mark A. Schwane
Colorado Federation of Public Employees
1590 Logan St, Suite 310
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I further certify that I have forwarded a true and correct copy of the foregoing DISMISSAL ORDER by depositing the same in interoffice mail, this 13th day of December 2001, addressed to:

Niels Loechell, Esq.
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