

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

Appeal No. 360-01

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

JOSEPH MOOREHEAD, Appellant,

v.

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

INTRODUCTION

For purposes of these Findings and Order, Joseph Moorehead shall be referred to as "Appellant." The Denver Department of Human Services shall be referred to as the "Department." The City and County of Denver shall be referred to as the "City". The Rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held January 9 and 18, 2002, before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant was present and was represented by Thomas McEwen, Esq., Edwin A. Howe, P.C. The Department and City were represented by Gary Jackson, Esq., and Neeti Pekar, Esq., DiManna & Jackson, Special City Attorneys, and Niels Loechell, Esq., Assistant City Attorney, with Linda Willoughby 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 Department:

Linda Willoughby, Jude Ligouri, Randall Martinez

The following witness was called by and testified on behalf of the Appellant:

Appellant

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

Exhibits 1 - 3

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

A – I, K

The following exhibits were admitted into evidence by stipulation:

Exhibits 1 – 3, A - I, K

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

Exhibit M

NATURE OF APPEAL

Appellant is appealing his termination from the Department for alleged violations of CSR §§16-50 A. 1), 7), and 20) and 16-51 A. 2), 4), 6), 10) and 11). He alleges retaliation in violation of CSR §15-106. He is seeking reinstatement to his position, along with back pay and all rights and benefits attendant thereto.

ISSUES ON APPEAL

Whether the Hearing Officer has subject matter jurisdiction over this appeal?

Whether Appellant violated CSR §§16-50 A. 1), 7), and 20) and 16-51 A. 2) 4), 6) 10) and 11)?

Whether the Department's action in terminating Appellant from his employment for the alleged violations of CSR §§16-50 A. 1), 7), and 20) and 16-51 A. 2, 4), 6), 10) and 11) was arbitrary and capricious or otherwise contrary to rule or law?

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

Whether the Department's decision to discipline and terminate Appellant was retaliatory in nature?

PRELIMINARY MATTERS

The Department filed two *Motions in Limine* on December 31, 2001. The first Motion requested that the Hearing Officer limit the testimony of Appellant's witnesses as irrelevant and/or cumulative. At the commencement of the hearing, the Hearing Officer instructed both sides that they were not to present cumulative witnesses and that issues of relevancy of testimony would be dealt with as each witness presented his or her testimony.

The second Motion was a request that the Hearing Officer limit the presentation of evidence to those issues properly brought in the Notice of Appeal and within the Hearing Officer's jurisdiction under the CSR. More specifically, the Department was concerned about issues surrounding Appellant's transfers from Adult Services to Family Employment Resources Division and then into the Family and Children's Division; that, other than as related to progressive discipline, prior employment actions were not

properly before the Hearing Officer; that the requested remedy included things outside the Hearing Officer's jurisdiction (i.e., "expungement of negative personnel actions, and reviews by they CSA of personnel practices of DDHS"); and that the evidence be limited to the circumstances surrounding Appellant's termination from employment. The Hearing Officer agreed that the proceeding before her dealt exclusively with the issues underlying Appellant's termination from employment on October 29, 2001, and his claim of retaliation under CSR §15-106.

During the argument on this Motion, Appellant's counsel raised the issue of discrimination. The Hearing Officer reminded the parties that, while Appellant alleged retaliation, he did not allege discrimination in the Notice of Appeal. Therefore, the Hearing Officer did not have jurisdiction over any discrimination claims. Previously, in his Prehearing Statement, Appellant raised alleged violations of City Charter C5.25 (B)(4) and CSR §15-93. The substance of these claims was that, when Appellant allegedly attempted to bring the union representative to meetings he had with his supervisors; permission was allegedly denied to him. Because Appellant did not grieve this situation, the Hearing Officer found she had no jurisdiction to review it.

FINDINGS OF FACT

1. Appellant was employed by the Department as a Senior Social Case Worker in the Family and Children's Division ("Division"). He originally began his employment with the Department in 1990. He began his employment in the Child Protective Services Division. He transferred into Adult Services in 1991. He was transferred into the Family Employment Resources ("FER") Division in September 2000 as the result of a disciplinary demotion. The disciplinary demotion was reversed by this Hearing Officer in May 2001. Because FER did not have a Senior Social Case Worker position within it, Appellant was transferred into Family and Children's Division effective July 7, 2001.

2. Appellant has a Master's of Social Work degree. He is licensed as a clinical social worker by the State of Colorado. He has a certification from the Academy of Certified Social Workers. Both the license and the certification require an MSW degree, supervision in a work setting for a specified number of hours and the successful completion of an examination. He testified that, when he started the job in July 2001, he believed he had the education, experience, and ability to perform the job.

3. Before Appellant came to work for the Department, he worked for a social services agency in Wisconsin performing child protective services functions.

4. Linda Willoughby became Appellant's direct supervisor when he transferred into the Division. Ms. Willoughby had known Appellant briefly when they both worked in the Division in 1990-1991. She had not seen him since.

5. Jude Ligouri, Operating Section Manager of Child Protection, was Appellant's second-line supervisor during the relevant period. Ms. Ligouri had briefly worked with Appellant when they both worked in the Division in 1990-1991.

6. Neither Ms. Willoughby nor Ms. Ligouri were involved in the matters that formed the basis of Appellant's disciplinary demotion or in an employment discrimination lawsuit Appellant has brought against several employees of the Department. According

to both women, neither of them have any knowledge about either of the aforementioned matters.

7. According to Ms. Ligouri, she found out that Appellant was going to transfer from FER during a staff meeting with Ms. Clyde Freeman and other managers in June 2001. Ms. Ligouri volunteered to accept Appellant into Child Protection because she needed the staffing. She assigned Appellant to Ms. Willoughby and her unit ("Unit") because Ms. Willoughby had less people to supervise than other supervisors in the Division

8. Appellant was assigned to Child Protection on July 9. Because Ms. Willoughby was on vacation at the time, Appellant met with Ms. Ligouri, who was responsible for his orientation into the Division. She welcomed him into the Division, went over the general expectations of the job and gave him instructions about initial computer based and other training programs he had to complete. He was told to meet with Sheila Alamonos to set up the training.

9. The training included a 32-40 hour computer-based training tutorial, which Appellant completed on July 16. He was also required to take a bi-monthly, two-hour training for six months which all new child protection services personnel were required to take. He needed to take the state-mandated CORE training (which he was scheduled to take the first week of September), and the 2 or 3 day training for TRAILS, a computer tracking system (which was scheduled for the last week of August).

10. Ms. Willoughby returned to work on July 19. She met with Appellant at that time. She went to where he was sitting, introduced herself, and asked him to come back to her office. Ms. Willoughby testified that he wanted to let her know immediately that he did not really want to be in the Division, that he did not like the work that the Division did, that he liked his old job, and that the transfer was "against his will," that it was not his first choice of a place to work.

11. Ms. Willoughby talked to Appellant about the cases he would be getting and the work he was expected to do. She informed him that she would give him cases over a week period (three the first day and one a day each day after that to a maximum of ten cases) and that the former case worker and she would help him cover everything for the next few weeks. Ms. Willoughby told Appellant that he would be responsible for all the cases by September. She told him about the need to produce court reports. Appellant indicated that he did not know how to type and asked if he could dictate the reports. Ms. Willoughby told him that they did not have the capability to produce the reports via dictation, but that another social worker in the Unit wrote her reports in longhand and clerical staff would type them for her. Ms. Willoughby also offered to provide typing lessons to Appellant through the office and suggested that he do the tutorials on the computer.

12. During this meeting, Appellant mentioned for the first time that he was approved for leave by his former supervisor, Twilla Stiggers, starting the next Monday, in order to take his wife to seek medical care in California. This surprised Ms. Willoughby because Appellant had not informed Ms. Ligouri about this. Appellant told Ms. Willoughby that the time was comp time. This also surprised her because social workers are not given comp time, only annual or sick leave. She told Appellant that he could take the leave since it was approved, but that it would be taken as either annual or sick

leave. Because Appellant was not actually working on any cases yet, there was no caseload-shifting problem when he took the leave.

13. Ms. Willoughby told Appellant that she would formally assign cases to him when he got back. She gave him the first three cases that day so that he could become acquainted with them before he began his leave.

14. Ms. Willoughby also explained that each social worker needed to have a cell phone. They are needed in case of emergency; the social worker might need to call 911. They are also useful in the field if a client does not have a phone, to retrieve messages, and to make sure the social worker remains in contact with the office. She told Appellant that the cell phone would be provided for him and she told him whom he had to go to in order to get it.

15. Appellant never got a cell phone. He testified that he asked Sandy Schneider several times and that she kept telling him, "I'm working on it." He testified that he did not document these requests because he did not want to become adversarial with Ms. Schneider.

16. Appellant told Ms. Willoughby that the reason he did not have the cell phone was because he needed training on how to use it. He was told that he would be given a booklet explaining how to use it. He also asked whether they expected him to use it while driving on the highway. Ms. Willoughby told him that the Department expected him to use proper judgment when using the cell phone.

17. The next day, Appellant expressed his concern that things had changed since he had been in the Division. Since Appellant had no other responsibilities or training needs that day, Ms. Willoughby told him to review and familiarize himself with the files he was getting.

18. Robin Bashford Brown, who was promoted in June, had been the social worker assigned to the cases Appellant was getting. They were all older cases and in good order. Ms. Brown was still in the Division and was available for consultation. Ms. Brown was also going to cover the court dates for the cases in August, giving Appellant time to become acquainted with the files and the parties. She also told Ms. Willoughby that she would speak to Appellant and accompany him on his visits to the clients. Appellant never went to speak to Ms. Brown or asked her for assistance or advice on any of the cases.

19. Appellant was supposed to return to work on August 1. He called in and indicated that he was tired and that he would be taking the day off as a sick day.

20. Appellant was assigned his first case on August 2. He was eventually assigned nine cases, including one that was out-of-state and required only an occasional phone call to check on the status. Most social workers in Ms. Willoughby's Unit handle ten cases.

21. Ms. Willoughby testified that the social workers in her Unit handle high-risk cases, meaning that they need to check on the client at least once a week. These checks must be at home in order to keep the children from going into foster care. That is one reason that the social workers in her unit handle only ten cases, not the forty that

social workers in other units routinely handle.

22. Appellant told Ms. Willoughby that ten cases was an overwhelming case load because it had been ten years since he did these types of cases and that things had changed in the interim. Ms. Willoughby agreed that there had been changes and that new things were now required. She told Appellant that she just expected him to conduct home visits, do assessments and write the narratives for the court reports, the same as she expected from anyone else who was just starting in the Unit. She told him that all the cases he was getting were on-going cases and that there were no problems with the clients. Ms. Willoughby told Appellant that he was not expected to know everything all at once and she expected it would take about a year for him to be fully proficient in handling his cases.

23. Ms. Willoughby had been supervising student interns for nine years and they were able to learn the job.

24. According to Ms. Willoughby, all social workers know that they must meet with clients in the home, attend staffings, and prepare paper work. There is no need to discuss this. They also know that is not really a nine-to-five job. Ms. Willoughby testified that she encourages them not to work more than 40 to 45 hours a week, but they occasionally need to work weekends or late when there is a crisis. Social workers need to be flexible in their time.

25. Ms. Willoughby has a formal "supervision" with each of her staff once a week. This is a Department-wide expectation. The only exceptions might be for very experienced social workers that have been doing the job for 10-20 years; they might require bi-weekly meetings instead.

26. Ms. Willoughby is in constant contact with her workers. She talks with them daily, on an informal basis, not just during the formal supervision meetings. She is available to her staff at night and on weekends. She informed Appellant of her availability to help. Appellant never took advantage of her availability or sought out her assistance in doing his work.

27. Ms. Willoughby said that people generally start working on a case as soon as they receive it. Ms. Willoughby assumed Appellant had reviewed the files when she gave them to him. She assumes all the social workers assigned to her are professionals. She assumes that if she requests something, it will be done.

28. Appellant admitted that he was told to contact the clients first and then review the files. He stated he did not follow those instructions because there might be a problem with the case and he wanted to know about it first. Appellant testified that he needed time to prepare the cases, learn about the parties, and take precautions about possible risks that might be involved in meeting with the families.

29. By August 16, Appellant had initiated contact with only two families, which, according to Ms. Willoughby, meant that Appellant had made only two phone calls. She suggested that if he were out, Appellant should stop by the homes of other clients and set up meetings.

30. Ms. Willoughby said that, by August 18, it would have been realistic for

Appellant to have set up meetings with all of his clients. The cases he had were not new from intake. The State requires contact with the clients at least once a month. Because the social worker handling the case had changed, some of the families had not been contacted for two or more months. The families were used to being in contact with the social worker, the initial assessments had been done, and the cases were in good shape. The families expected to meet with the social worker and they were also aware that they were getting a new social worker.

31. Appellant constantly complained to Ms. Willoughby that he had too many cases, too much was expected of him, and "I cannot do it." Appellant complained to Ms. Willoughby that there were too many demands on his time, including extensive state mandated training.

32. Ms. Willoughby testified that no other new social worker complained about not being able to do the training and make the initial phone contacts with the clients. This included the college and graduate students assigned to the Unit, who were required to go to school as well as attend the Department's training and maintain a caseload.

33. Ms. Willoughby told Appellant that the Department was not expecting any more from Appellant than it required from any new social case worker, not what was expected from experienced senior social case workers.

34. The weekly supervision meetings with the Appellant were scheduled to begin at 9:00 a.m. He was ten to twenty minutes late for every meeting. When Ms. Willoughby suggested that they start at 9:30, Appellant said, "No, I want 9:00." She testified that she felt Appellant was dismissive and he did not think that these meetings were important.

35. Appellant continually complained that he was not able to make or receive calls, make appointments or perform his other duties because he was overwhelmed. When Ms. Willoughby asked Appellant about the status of any of his cases, they never got beyond: "Did you contact the family?" "No." "Did you contact the therapist?" "No." She testified that they could never get to Appellant's assessments of the cases. She also stated that Appellant did not react when she asked him what was going on, that he never spoke about concern for the families or expressed empathy for the families, things she would expect from a social worker. She would suggest strategies to do the work, but Appellant never said he tried any of them nor did he indicate that he had and they did not work. Ms. Willoughby told Appellant that she thought he could succeed and that she did not believe that he did not care about his job. She admitted that she had never supervised anyone else who never attempted to do the job.

36. Ms. Ligouri reiterated the difficulties of working with Appellant. She noted that, when she first met with Appellant, he sarcastically said to her, "I've had no idea I was going to work for someone so perky." She told him that it was better to care and be passionate about the work, so she was going to take it as a compliment. She then asked him what his commitment was to the job. Appellant responded in a flat tone. He stated, "I have this piece of paper that says to be here from Clyde Freeman."

37. Ms. Willoughby stated that, by mid-to-late August, she started to get calls from other professionals who worked with Appellant's clients, including therapists and

psychologists, as well as from clients themselves. They were telling her that they had not heard from Appellant and he did not return their phone calls.

38. On August 23, Ms. Willoughby prepared a memorandum for Appellant that she planned to give him at his next supervision that day. Since the supervision did not occur until August 25, she did not give it to him until then. This memo set out several deficiencies in each of Appellant's cases and other problems with his work. It also set out specific things Appellant was supposed to do on each case by August 30. (Ex. 1, pp. 14-16).

39. On August 24, Ms. Willoughby started to take note of Appellant's hours. While she conceded that social workers are professionals and are in control of their time, she also testified that Appellant wasn't at work at all. Appellant testified that the week of August 24 through 30, he worked eight hours each day.

40. Court reports are important documents that need to be prepared by the social worker for distribution to the court and the attorneys prior to a hearing. These reports describe how the family is doing since the last court appearance, the treatment plan, and the progress on that plan. These reports are due in to the court at least ten days before the court date. As a result, the draft of the report must be turned in to Ms. Willoughby for review two weeks before the court date so she can review it before it is finalized and typed up for the court.

41. Ms. Willoughby testified that there is on-going training on how to prepare court reports for the first six months of a social worker's tenure in the Unit. She gives examples to new employees to review. The general components have not changed in at least twelve years. She first has new social workers complete the narrative section; they later learn how to complete the other portions.

42. When Appellant first met with Ms., Willoughby in her office, she reviewed the court reports with him. He told her that he needed training. She told him, "This is it." He asked for "formal training." She indicated that she had samples for him and that she would help him fill them out or answer any questions he had as he began to prepare them.

43. Ms. Willoughby entered the due dates for Appellant's court reports onto her calendar, as she does for every member of her staff. The calendar is accessible to all of her staff. Ms. Willoughby testified that Appellant noted the due dates either in his notes or in his calendar.

44. One of the items listed in the August 23 memo Appellant was supposed to complete was the final copy of the court report in the Hanh Tran case, which was scheduled for a hearing on September 7. It was the first court report Appellant had to complete. Ms. Willoughby had not seen the draft of the report and was concerned that it would not be completed in time. Appellant did not complete the report in time. As a result, it was not provided to the court in a timely manner. Because the court did not receive the report in time, it would not consider whether to return the Tran children to their father at the September court hearing, as everyone had previously expected. The decision to return the children was delayed until October.

45. At around the time of the August 24 meeting with Ms. Willoughby,

Appellant told her that he had made arrangements with Twilla Stiggers, his former supervisor, to supervise a Metro student intern during the coming academic year. Ms. Willoughby told Appellant that he could not do it because the student was assigned to another division and Appellant was not doing his own job, which he constantly told her was overwhelming him. Appellant was angry with this because he felt that Ms. Willoughby denied him the opportunity to supervise this student in an attempt to stop him from obtaining advancement within the Department.

46. Appellant met with Ms. Willoughby and Ms. Ligouri on September 13 to determine if he had completed the work he was instructed to in the August 23 memo. According to Ms. Willoughby's notations on the memo made in preparation for that meeting, Appellant had performed at least one item with regard to each case, but that he had not performed all the items for any of the cases. She also noted that Appellant had not done the paperwork to have a case service aide and a family advocate assigned to each case, those people being support staff who could have helped Appellant with some of the more mundane tasks relating to the maintenance of the cases. He still had not obtained a cell phone. He had not prepared the ROC notes for any of his cases or, if he prepared them, not placed them into the files. (Exhibit 1, pp. 21-23).

47. Ms. Willoughby testified that during August Appellant was not expected to cover any of the court hearings for his cases, that either Ms. Brown or herself would be doing that. However, Appellant was expected to attend the hearings so that he could see the judge, attorneys and clients. Ms. Willoughby testified that Appellant called in sick on each of the days he was supposed to attend and observe court.

48. Appellant was supposed to ensure that one of his clients (Emilio) attended all his hearings, including matters before the juvenile court. Appellant did not make sure there was transportation for the child, who wound up missing a court appearance.

49. Appellant was supposed to visit the clients at their homes in order to check out the conditions under which the children were/would be living. The few times Appellant actually met with the clients, he usually did so at their place of work, not at home.

50. Appellant testified that his clients lived in three different counties and that he spent a lot of time driving around. He also stated that appointments themselves would vary from one-half hour to two hours in length.

51. On September 13, Ms. Willoughby provided another memorandum to Appellant listing further deficiencies in his work. (Exhibit 1, p. 25-26). According to Ms. Willoughby's notations on that memo, Appellant had performed some of the work noted, but that many of the items were still not done. Some of the things noted in this memo include Appellant's failures to return phone calls, make appointments, be prepared to speak about a case at its Family Group Conference (requiring the mother to discuss her own treatment plan, fill out required forms, and other work she expected Appellant to be able to complete by that time. Both Ms. Willoughby and Ms. Ligouri testified that when they asked Appellant about these continuing problems during their September 13 meeting, he kept his head down, did not answer and was otherwise non-responsive. They asked him whether there was anything they could do to help him, but Appellant was again non-responsive.

52. After Ms. Ligouri and Ms. Willoughby met with Appellant on September 13, they decided to consult with others about how to handle the problems with Appellant. They were particularly concerned that the children that the Unit was responsible for might be at risk of physical or other harm due to the Appellant's failures and delays in handling his caseload. At a minimum, Ms. Ligouri felt Appellant was conveying the message to his clients that they were not worth it.

53. It was decided at this meeting with Paul Sienkiewicz and Niels Loechell (and possibly Alvin Howard) that formal discipline might be appropriate.

54. Appellant was placed on investigatory leave effective September 14. The notice of contemplation of discipline was sent to Appellant on September 28. The pre-disciplinary meeting was held on October 23. Because the meeting was delayed for a while that afternoon, Appellant and his counsel chose not to attend. However, they submitted a written response to the charges. Randy Martinez, Deputy Manager, considered the information contained in the notice of contemplation of discipline, Ms. Willoughby's memoranda to Appellant, Appellant's written response to the allegations, and Appellant's prior history. After this review, Mr. Martinez decided to terminate Appellant's employment based upon his violations of CSR §§16-50 A. 1), 7), and 20), and 16-51 A. 2), 4), 6), 10) and 11).

55. The Notice of Disciplinary Decision was mailed to Appellant on October 27. This appeal followed on November 2, 2001.

56. Appellant testified at the hearing that he had, in fact, done some of the work listed in the August 23 and September 13 memos, but he was unable to provide much information beyond "I think we played phone tag" or the reports were in the stack of papers he left on his desk. He complained that he had to type his reports and that he is not a fluent typist. He stated that the files were not in order when he received them and that he often had to look for ROC notes or other data. He stated that he had had a problem locating one of the clients because she actually lived in Brighton, not Denver, which he did not learn until he met one of the neighbors. He testified that he had met with Hanh Tran (along with her children) at the INS Detention Center and that he met with her "husband" at his work and, on August 31, at his home. He also indicated that he had learned a few words of Vietnamese and that Ms. Tran's husband thanked him for that after the September hearing. He said the delay in returning the children to Ms. Tran's husband was due to the fact that he did not have the necessary furniture yet. He admitted that he had not transported Emilio to one of his juvenile hearings, but that he did get him to two others and that he left a message at the group home where Emilio lived to tell them he would not be able to take Emilio to the third hearing because he was sick and that other arrangements would be necessary. Appellant admitted that he knew that keeping and filing accurate ROC notes were necessary so that anyone else picking up the file would know what had been done.

57. Appellant testified that he felt isolated and Ms. Willoughby and Ms. Ligouri were treating him like an abused child. He stated that, when he first came to the Division and he wanted to talk about his prior history with them and others, they told him not to talk about it. He said this was similar to telling an abused child not to tell anyone of the abuse. He testified he met with Ms. Willoughby and Ms. Ligouri behind closed doors and that they told him not to discuss what they said in the meetings. He indicated

this was similar to abusing a child in private and instructing him not to tell. He said he was told not to attend a meeting with the rest of the Unit that he had previously been instructed to attend. He said this was similar to cutting an abused child off from contact with outsiders.

58. Appellant admitted he stonewalled Ms. Willoughby and Ms. Ligouri at their meetings because he did not have answers to their questions and he did not want to be perceived as threatening or violent. He was docile and avoided eye contact. He was consciously avoiding the appearance of being threatening. He stated he was a pretty reticent person and he was pretty depressed by the time of the September 13 meeting. He also stated Ms. Ligouri and Ms. Willoughby gave the impression that the meeting had "gone south" pretty quickly.

59. Appellant claimed that Ms. Willoughby and Ms. Ligouri's actions were retaliatory because of his other lawsuits against Department personnel. He was unable to state how he knew it was retaliatory, other than his claim they were acting at the direction of Human Resources and his "suspicions" were confirmed when he was escorted from the building on September 13. He admitted that he did not know whether they knew the details of his other cases and that they had both stopped him when he wanted to discuss the details of those cases. He also admitted that they told him that he was starting with a "clean slate" as far as they were concerned.

60. While Ms. Willoughby did not address all of Appellant's allegations that she and Ms. Ligouri were treating him like an abused child, she stated Appellant was excused from a staff meeting so that he would have time to do his work. She denied that either she or Ms. Ligouri was abusing Appellant.

61. The General Statement of Duties for the Senior Social Case Worker classification provides: "Performs advanced professional social case work." The Job Responsibilities and Knowledge, Skill, and Ability Requirements for the classification are:

1. Performs comprehensive psychological assessments to determine the nature and extent of client's strengths and needs in order to formulate comprehensive treatment plans.
 - o Skill in applying theories, precedents, and techniques of social work for treatment of a client's behavior.
 - o Knowledge of interviewing techniques sufficient to be able to elicit information.
 - o Skill in establishing and maintaining effective working relationships with other employees, organizations, and the public.
2. Utilizes differential diagnosis, principles of human behavior and available treatment to determine the intensity and modalities of necessary treatments.
 - o Knowledge of advanced therapeutic counseling techniques, including group therapy
 - o Skill in applying theories, precedents, and techniques of social work for treatment of a client's behavior.

- Skill in establishing and maintaining effective working relationships with other employees, organizations, and the public.
 - Skill in independently adopting, interpreting, and applying written guidelines, precedents, and standardized work practices to a variety of unprecedented and problematic situations.
3. Develops comprehensive treatment plans to assist clients in reaching program goals.
- Knowledge of the theories and practices of counseling and social work sufficient to perform the duties related to the work assignment.
 - Knowledge of crisis intervention theory sufficient to be able to perform the duties related to the work assignment.
 - Skill in independently adopting, interpreting, and applying written guidelines, precedents, and standardized work practices to a variety of unprecedented and problematic situations.
4. Provides or supervises therapeutic client services including group therapy, behavior management, marital/domestic violence counseling, or solution-focused client counseling to stabilize and improve client's status.
- Knowledge of advanced therapeutic counseling techniques including group therapy.
 - Knowledge of the theories and practices of counseling and social work sufficient to perform the duties related to the work assignment.
 - Ability to establish and maintain effective working relationships with others including children, family members, co-workers, and community members.
 - Skill in exercising initiative, judgment and decision-making in solving problems and meeting organizational objectives.
5. Provides intensive ongoing supervision of client progress and monitors progress.
- Ability to develop methods for monitoring and evaluating quality of service and compliance with rules, policies, and statutes.
 - Knowledge of the theories and practices of counseling and social work sufficient to perform the duties related to the work assignment.
 - Skill in preparing professional reports and documents, clearly expressing and conveying concepts.
6. Coordinates services to clients by interfacing with community-based organizations, client family members, staff and others.

- Skill in the use of collaborative relationships in social work.
 - Skill in establishing and maintaining effective working relationships with other employees, organizations, and the public.
 - Knowledge of the theories and practices of counseling and social work sufficient to perform the duties related to the work assignment.
 - Skill in independently adopting, interpreting, and applying written guidelines, precedents, and standardized work practices to a variety of unprecedented and problematic situations.
7. Testifies in court as needed by providing expert testimony and preparing comprehensive reports that allow the court to make findings and recommendations that affect court-ordered treatment plans.
- Skill in using the principles and practices of effective and persuasive communication to elicit information, negotiate problem resolution, and/or garner support for various programs or policies.
 - Knowledge of the theories and practices of counseling and social work sufficient to perform the duties related to the work assignment.
 - Skill in preparing professional reports and documents clearly expressing and conveying concepts.
8. Documents and keeps accurate records on clients including a history of treatment to assist with program accountability.
- Skill in preparing professional reports and documents clearly expressing and conveying concepts.
9. Assists clients involved in the legal system with problems and facilitates appropriate changes in behavior.
- Skill in applying theories, precedents, and techniques of social work for treatment of a client's behavior.
10. Performs other related duties as assigned or requested.

The level of guidance and decision making for the classification provides:

Guidelines are generally but not always clearly applicable, requiring the employee to exercise judgment in selecting the most pertinent guideline, interpret precedents, adapt standard practices to differing situations, and recommend alternative actions in unprecedented situations. Work assignment is performed within an established framework under general instructions. Employee is responsible for determining time, place and sequence of actions to be taken. Unusual problems or proposed

deviations from guidelines, practices or precedents may be discussed with the supervisor before being initiated. Completed work is generally reviewed for soundness of judgment and conclusions, adequacy and conformance to policy.

(Exhibit 2)

DISCUSSION AND CONCLUSIONS OF LAW

Applicable Rules and Statutes

CSR Rule 15 is the Code of Conduct for employees in the Career Service. CSR §15-106, Retaliation Prohibited, provides:

Retaliation against employees for reporting unlawful harassment or discrimination or assisting the City in the investigation of any complaint is against the law and will not be permitted. Retaliation can include, but is not limited to, such acts as refusing to recommend an employee for a benefit for which he or she qualifies, spreading rumors about the employee, encouraging hostility from co-workers and escalating the harassment. Any employee engaging in retaliation may be subject to corrective action, up to and including dismissal.

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

- 4) Failure to maintain satisfactory working relationships with co-workers, other City and County employees or the public.
- 6) Carelessness in performance of duties and responsibilities.
- 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.

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 (dismissal/termination of employment), the Department has the burden of proof to demonstrate that its decision was within its discretion and appropriate under the circumstances. Appellant, having raised retaliation as an affirmative defense, has the burden to establish that the Department's decision was retaliatory.

Appellant has been charged with violating several provisions of CSR Rule 16. The first of those, and perhaps the most serious allegation, is he 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."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

"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)³

In other words, "gross negligence" does not require that the Department show that Appellant intentionally acted in a wrongful manner, just that he performed his work in a manner that was more than careless or inadvertent and that the failure to perform the work 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."⁴

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.)⁵

Appellant was 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

¹ *Miriam-Webster's Collegiate Dictionary*, 10th Ed., 1993

² *Black's Law Dictionary*, 4th Ed., 1951

³ *ibid.*

⁴ *Miriam-Webster's*, *op cit.*

⁵ *Black's*, *op cit.*

establish either "gross negligence" or "willful neglect."

The Hearing Officer has considered the testimony presented by the three witnesses with direct knowledge of Appellant's alleged misconduct: Ms. Willoughby, Ms. Ligouri, and Appellant. The evidence clearly establishes that Appellant's work performance from July 7 through September 14 (the effective date of his investigatory leave) was deficient.

The Hearing Officer will not rehash every instance of Appellant's failure to prepare reports, conduct visits, make phone calls, appear in court and meetings, make arrangements for client's court appearances, or maintain his files, all of which are set out in the Findings of Fact above. The question for the Hearing Officer is whether these failures meet the requirements of either gross negligence or willful neglect, or whether they were due to mere carelessness. After a careful review of the evidence, the Hearing Officer concludes that Appellant's work performance during the relevant period was grossly negligent and/or that he was willfully neglecting his duties. In other words, there was nothing "careless" or accidental about it.

Appellant came into the Child Protective Division not because he wanted to, but because "Clyde Freeman gave him a piece of paper." He would have preferred to stay in the FER Unit where he got along with Twilla Stiggers, the supervisor who had given him comp time despite the fact that it was against the Department's Rules and with whom Appellant planned to mentor and supervise a student intern. However, he could not remain in the FER Unit after Appellant was reinstated as a Senior Social Case Worker classification after his prior disciplinary proceeding.

Appellant was displeased and made every effort to let both Ms. Ligouri and Ms. Willoughby know it. He was rude to both women, he ignored their instructions and their offers of assistance, he was angry with their refusal to listen to his recitation of his past history with others at the Department and did not want to believe that they might actually be willing to treat him as a new employee with a clean slate and no prior history.

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 himself. He testified that he is an experienced social worker, that he has a Master's of Social Work degree, is licensed as a clinical social worker by the State of Colorado and has a certification from the Academy of Certified Social Workers. He stated that the license and the certification required an MSW degree, supervision in a work setting for a specified number of hours and the successful completion of an examination. He also testified that, when he started the job in July 2001, he believed he had the education, experience, and ability to perform the job.

This means that Appellant knew that, with a little training in particular statutory mandates for Child Protective Services (training that was to be provided to him for at least the first six months of his tenure in the position), he was able to do the job. His failures included such things as the his lack of contact with clients, inability to obtain a cell phone, failure to provide a draft of his court report to Ms. Willoughby in a timely manner, failure to make court appearances, and failure to be prepared for meetings. None of these failures can be attributed to a lack of training. They can only be attributed either, at a minimum, to Appellant performing his work at a level that was obviously unreasonable or inappropriate ("gross negligence") or, even worse, to a purposeful or willful performance of his 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 violating CSR §16-50 A. 7), failure to comply with the orders of his authorized supervisor and refusing to do assigned work which he is capable of performing. He 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. Willoughby's instructions and his failure to do the assigned work within the time frames set by Ms. Willoughby. The Hearing Officer finds that both the requests and the time frames for performing the tasks were reasonable for any new employee starting in the Unit, including the student interns. Appellant also admits that he is capable of performing those tasks. The Hearing Officer concludes that Appellant has violated CSR §§16-50 A. 7) and 16-51 A. 10).

Appellant is charged with violating CSR 16-51 A. 2), the failure to meet established standards of performance. The requirements for this provision are not identical to the requirement for violations of CSR §§16-50 A. 1) or 16-51 A. 6). This provision covers performance deficiencies that can be measured by either qualitative or quantitative standards, such as those one would find in a performance evaluation or an agency or division's published policy and procedures. In this case, the Department submitted, as Exhibit 2, a copy of the classification description for a Senior Social Case Worker, Appellant's classification during the relevant period. That document not only provides a general description of the job classification, it sets out the general types of job responsibilities and the level of knowledge, skill and ability required for those responsibilities.

Upon review of the classification requirements and the testimony from Ms. Willoughby and Ms. Ligouri about what Appellant did and did not do during his tenure in their Division (such as, but not limited to, prepare reports, document and keep accurate records, meet with clients, coordinate services to clients, assist clients involved in the legal system with problems and facilitate appropriate changes in behavior), the Hearing Officer concludes that Appellant did not meet the standards of performance for his job classification. Appellant violated CSR §16-51 A. 2).

Appellant is charged with violating CSR §16-51 A. 4), failure to maintain a satisfactory working relationship with his co-workers, other City and County employees or the public. While the ability to work with others is part of the general job requirements for all social workers (see Exhibit 2), it is also a separate grounds for discipline under the CSR. Statements about Appellant's problems working with members of the public, including his clients, therapists, and others, are hearsay and will not be considered. Even still, the record clearly establishes that Appellant was not maintaining a satisfactory working relationship with his co-workers, in particular his two supervisors, Ms. Willoughby and Ms. Ligouri. Appellant was often petulant and rude to them when he chose even to acknowledge their presence. This is not a satisfactory working relationship. He 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 claimed in his defense that the disciplinary action was retaliatory in nature because of his other lawsuits against Department personnel. However, when questioned by the Department's counsel, he was unable to state how he knew it was retaliatory, other than making an unsubstantiated claim that Ms. Willoughby and Ms. Ligouri were acting at the direction of Human Resources and professing his nebulous suspicions of retaliation. Appellant admitted that he did not know whether Ms. Ligouri or Ms. Willoughby actually knew the details of his other cases although he thought that they had to. He also admitted that both women stopped him when he wanted to discuss the details of those cases and they told him that he was starting with a "clean slate" as far as they were concerned. Appellant has the burden of proof on this issue and the Hearing Officer cannot make a finding based upon the Appellant's own gut feelings and inferences. There must be credible, substantiated, tangible evidence for the Hearing Officer to find retaliation. No such evidence has been presented. The retaliation claim is dismissed.

The last issue before the Hearing Officer is the appropriate level of discipline given the allegations proven by the Department. In determining the appropriateness of the discipline imposed by Mr. Martinez, the Hearing Officer has looked at Appellant's behavior during the hearing, his inability to accept responsibility for his actions, his minimization of the effects of his behavior, his stonewalling on questions asked of him during cross-examination, his attempts to shift blame from himself to others, including those who were no longer even working for the Department at the time of his termination, and his disingenuous attempts to compare himself to an abused child.

The Hearing Officer has considered Appellant's employment history as it establishes notice to him that his performance has been lacking since at least January 2000. This was also a factor discussed by Mr. Martinez in his decision to terminate Appellant (Exhibit 1, p. 4). While the Hearing Officer found that the Department did not make out the allegations charged by a preponderance of the evidence in the prior disciplinary matter (*In the Matter of the Appeal of Joseph Moorehead*, CSA Appeal No. 185-00), and she reinstated him to the Senior Social Case Worker status, she also warned that she did not want the parties to conclude that Appellant's performance from January through June 2000 (the period covered by that proceeding) was appropriate.

The problem for the Hearing Officer is that, while Appellant was deficient in his performance, the vagaries in the Department's charging document and failure to produce sufficient credible evidence do not permit the Hearing Office to make a finding in favor of the Department. (at p. 19)

The problems with either the information contained in the charging document or the sufficiency of the evidence presented by the Department do not exist with this case.

Appellant was given a second chance to improve his performance and work with others who did not know the particulars of his employment history. This time Appellant's conduct is so outrageous that it does not require expert testimony to explain why it is grossly negligent. This time Appellant testified and admitted that he knew how to do the job. This time the Hearing Officer can only conclude that Appellant chose not to do it at a satisfactory level.

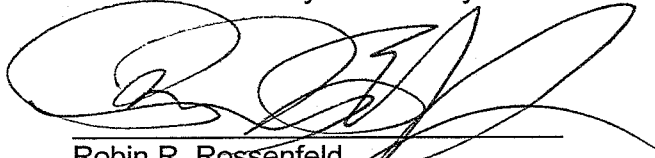
Even without notice of performance problems in the prior proceeding, there is sufficient evidence in this record to support termination. Ms. Willoughby and Ms. Ligouri did not make any unreasonable demands upon Appellant. They expected him to perform at the level of any other new employee, not even as an experienced Senior Social Case Worker. They gave him the opportunity to ask questions, seek assistance, obtain additional support personnel, slowly learn the job. Appellant chose not to avail himself of any of these things. Instead, he remained passive. He refused to supply information when asked, did not follow even the simplest of requests, and blamed others for his situation.

Appellant was given a second chance. He did not take it. The record justifies his termination from employment with the Department as appropriate. The discipline of termination is affirmed.

ORDER

Therefore, for the foregoing reasons, the Hearing Officer MODIFIES the disciplinary action as follows: the Department's determination that Appellant violated CSR §§16-50 A. 10 and 7) and 16-51 A. 2), 4) and 10) is AFFIRMED; the Department's determination that Appellant violated CSR §§16-50 A. 10) and 16-51 A. 6) and 11) is DENIED. Appellant's termination from employment 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 28th day of February 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 ~~4th~~ day of March 2002, addressed to:

Joseph Moorehead
5980 S. Bluebell Lane
Evergreen, CO 80439

Thomas A. McEwen, Esq.
Edwin A. Howe, P.C.
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Gary Jackson, Esq.
Neeti Pekar, 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 ~~4th~~ day of March 2002, addressed to:

Niels Loechell
Assistant City Attorney

Alvin Howard
Department of Human Services

Virginia Granado