

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

Appeal No. 28-02

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**FINDINGS AND ORDER**

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IN THE MATTER OF THE APPEAL OF:

**GABRIEL OLIVER, Appellant,**

v.

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

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**INTRODUCTION**

For purposes of these Findings and Order, Gabriel Oliver 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 June 4, 5, 6, and 25, 2002, before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant was present and was represented by Kesha Rizzolo. The Department and City were represented by Niels Loechell, Esq., Assistant City Attorney, with Clyde Freeman 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:

Donna Goode, Jay Morein, Dr. Chris Veasey, Annette Martinez, Tammi Raatz, June Allen, Frank Waterman, Bryan Gross, Clyde Freeman, Merab Sandoval

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

Appellant, Jude Ligouri, Rebecca Orona, Jan McIntosh

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

Exhibits 1, 2, 3, 8, 11, 12, 13, 14, 14a, 15, 16, 17, 18, 19, 20, 21, 22, 27, 28

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

Exhibits C, D, G, I, J, K, L

The following exhibits were admitted into evidence by stipulation:

Exhibits 1, 2, 3, 8, 11, 12, 13, 14, 14a, 15, 16, 17, 18, 19, 20, 21, 22, C, D, G, I, J, K, L

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 disciplinary demotion from Social Case Worker Manager, pay grade 812-A, to Social Case Worker Supervisor, pay grade 809-O, for alleged violations of CSR §§16-50 A. 1), 7), and 20) and 16-51 A. 2), 6), 8), and 11). He alleges harassment and discrimination in violation of CSR §15-100, *et seq.* 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), 6) 8) 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), 6), 8) 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 demote Appellant was either harassment or discrimination?

### PRELIMINARY MATTERS

None.

### FINDINGS OF FACT

1. During the relevant period, Appellant was employed by the Department as a Social Case Worker Manager in the Family and Children's Division ("Division"), a position he held for approximately 2 years. Prior to that, he was a Social Case Worker Supervisor in the same Division for approximately 4 years.

2. Appellant has a Bachelor's Degree in Social Work and a Master's in Public Administration.

3. As a Social Case Worker Manager, Appellant was an administrator for the Division. Approximately 10% of his job responsibility was administering grants.

4. According to Appellant, as the program administrator for grants, his job was to develop and monitor the programs. He usually did not have any fiscal responsibility for the grants.

5. Two grants Appellant had administrative responsibility for were the Promoting Safe and Stable Families ("PSSF") and Expedited Permanency Planning ("EPP") grants. Appellant had fiscal responsibility for these grants.

6. Four providers received money under the EPP grant. They were Catholic Charities, Urban Children's Coalition ("UCC"), Colorado Nonprofit Development Center ("Southwest Family Center") and Family Preservation Advocates ("Family Konnektions").

7. The EPP Scope of Service, which was attached to and incorporated into the grant contract, provides in relevant part:

#### **A. BACKGROUND**

During the last two years the Denver Department of Human Services (DDHS) and four community based organizations have successfully collaborated in assisting with wrap around service with intake and on-going child protection cases, family group conferencing, intensive home based services,

and an enhanced visitation program.....<sup>1</sup>

**B. PROBLEM/NEED ASSESSMENT**

There continue to be significant numbers of children who are at risk for out-of home placement or who have already been temporarily removed due to abuse and/or neglect. The community-based family advocate programs throughout Denver have the expertise and capabilities to support and provide the necessary services for these children and families. The programs have successfully assisted the Denver Department of Human Services in reaching the goal of allowing children to be reunified with their family in a stable, nurturing and safe environment.

**C. TARGET POPULATION**

The target population will be children – under the age of six, who have been placed out of home due to neglect and/or abuse by their caregivers. Siblings of these children will also be served if they are twelve years or younger.

**D. PROGRAM DESCRIPTION/SERVICE DELIVERY**

The advocates will provide the following services:

- 1) **Family Group Conferencing (FGC).** This partnership has implanted FGC for 2 years where the community and DDHS have jointly brought together biological family members to secure permanent placement for children and on going support services for caretakers. This program will be expanded to include all cases for families in accordance with the EPP guidelines with children five years and under who have been court ordered for out of home placement.
- 2) **Monitoring the Family Plan.** The family advocacy programs will work in close collaboration with the DDHS caseworker on implementing the family's service plan, which was generated from the FGC. Family advocates will accomplish this service through home visitation, telephone contacts, identifying needed community resources, clinical staffings through DDHS, and any other support the family may require.
- 3) **Supervised Parenting Time.** Family advocates will, in compliance with DDHS protocol, provide supervised parenting time for children placed out of

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<sup>1</sup> The Scope of Service states that three providers would be implementing the EPP grant. This was eventually expanded to include all four providers.

home. This supervised parenting time will be intense in nature averaging 2 to 4 times per week based on the family's need. Furthermore, once the case progresses and reunification is the permanent goal, then family advocates will increase weekly parenting time to ensure the successful transition of the permanent placement.

\* \* \*

- 4) **Support System Caretakers.** The family advocate will provide wrap around advocacy services to the caretakers for the child. These services are dependent upon the stage of permanency planning and where the child is in placement throughout this process (i.e. stranger foster care, relative foster care, kin placement, maintaining and/or transitioning the child in the home). Family advocacy wrap around services include and are not limited to:

*Parenting Services...*  
*Health Related Services...*  
*Home Management Services...*  
*Personalized Services Needed...*

\* \* \*

#### E. PROGRAM GOALS

The goals of these services are as follows:

- 1) Protect the physical, emotional and psychological development of the child.
- 2) Identify and build upon existing family strengths to increase the family's and/or caregiver's ability to function independently and to provide a safe, nurturing home environment.
- 3) Effect expedited permanency placement for children.

\* \* \*

(Exhibit 13, pp. 168-171)<sup>2</sup>

8. The original contracts, dated February 2001, were for \$83,483.33 each and covered the period from November 1, 2000 through June 30, 2001. (Exhibit 13, p. 157) In August 2001, the term of the contracts were extended until June 30, 2002 and the amount of each contract was increased to \$250,449.33

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<sup>2</sup> In the interest of clarification, the Hearing Officer will reference the Catholic Charities contracts and their addenda (Exhibit 13). Identical provisions are included in the contracts for the other providers Family Konnektions (Exhibit 14); Southwest Family Centers (Exhibit 15); and UCC (Exhibit 16).

(Exhibit 13, p. 140).

9. Appellant, Ms. Orona, and the four directors of the designated providers prepared the Scope of Service and devised the budget for the grant. The Proposed Budget for the 2001-2002 year provides:

Line Item	Allocation Per Site	Total
Personnel:		
Supervision	5,333	21,332
4 Family Advocates	106,000	424,000
Fringe Benefits	26,200 (S/W & FK)	
	21,200 (UCC & CC)	
95,400		
Administrative Costs		
Indirect	18,000	72,000
Equipment/Supplies		
Consumable	4,200 (S/W & FK)	
	9,500 (UCC & CC)	
27,400		
Phones	2,400	9,600
Family Group Conference	1,333	5,332
Travel		
4 FA's Mileage	3,200	12,800
TOTALS	166,966	667,894

(See Exhibit 13, p. 146)

10. The Department had taken over the administration of the PSSF grants from Mile High United Way in July 2001. Rebecca Orona, who had been in charge of the grants for Mile High, came to the Department on a temporary basis and continued to do the work on that grant although Appellant was the responsible signatory for the payment requests for those two grants.

11. Appellant and Jay Morein both testified that they met and spoke with the four program directors about what was required when they submitted invoices for reimbursement.

12. Appellant testified that he never saw the grant contracts prior to the time he was given them in preparation for this hearing. He testified that he did not know what information or requirements they contained.

13. Appellant testified that he received no training about what was required to process the invoices. He stated that he thought that someone in Financial Services was responsible for ensuring that the expenditures were in compliance with the grants. He stated that all he did was make sure that the time sheets submitted by the providers appeared to be in conformity with the time spent by the individual family advocates. Then he signed the Request for Payment verification ("ADM 8") and sent all the paperwork on to Financial Services for processing.

14. Appellant testified that the first time he sent the paperwork on to Financial Services, he had not signed the ADM 8. He got a message through his administrative assistant that Mr. Morein told him to write "Okay, Gabe Oliver" on the invoices and sign the Requestor Verification on the ADM 8.

15. The Requestor Verification reads:

I CERTIFY THAT:

Prepayment is required for materials or services. (check box provided)

The materials or services invoiced were received by this agency.

The materials appear to comply with specifications.

The services appear to be satisfactory.

(Exhibit 13, p. 1)

16. Appellant stated that he did not know that the verification for the request for payment on the ADM 8 had any legal ramifications.

17. Appellant testified that it was not his job to review any of the documentation submitted to make sure that the expenditures were appropriate. He stated that the responsibility lay with someone like Bryan Gross, a Budget Analyst with the Department.

18. Appellant testified that he was aware that the providers kept very poor books. He suggested to Mr. Morein that a CPA be hired to teach them how do to their bookkeeping.

19. Jude Ligouri, a Social Case Worker Manager in the Division, testified that, while she was not normally responsible for the financial administration of the EPP and PSSF grants, she signed the ADMS 8's a few times in Appellant's absence. She testified that she did not know that there was a legal meaning behind the Requestor Verification or the actual terms of the contracts.

20. Jan McIntosh, a Social Case Worker Manager in the Division,

testified that she was responsible for administration of other grants under the supervision of the Division. Ms. McIntosh testified that she was aware of the meaning of the Requestor Verification and that she reviewed the contracts and the relevant law for the grants that she was administering.

21. In October 2001 Appellant came to Mr. Morein with a problem. One of the Family Konnektions family advocates had not been reimbursed for her mileage. She needed the money so that she could move from her home due to an emergency situation with a family member. Although the provider was supposed to pay the employee directly for the mileage and then seek reimbursement as a cost under the grant, Mr. Morein agreed to pay the money directly to the employee and deduct the money from the provider's request due to the emergency nature of the situation.

22. Appellant saw this as an example of the delays that it took the City to issue warrants and repay the providers. He testified that the delays in paying the invoices provided a major cash flow problem for the providers meeting their payrolls. He claimed that this led to several family advocates quitting for failure to be paid in a timely manner. He felt it was his job to ensure that the providers got their reimbursement faster and that he frequently told Mr. Morein and others that this problem existed.

23. Appellant was out on leave in approximately December 2001. At that time, Bryan Gross took responsibility for processing the payment requests. Mr. Gross noticed that there were several deficiencies in the invoice documentation submitted by the providers. He asked Mr. Morein if he should review the invoices that Appellant had previously approved for payment. Mr. Morein gave Mr. Gross permission to conduct an audit.

24. Mr. Gross produced a report that set out \$151,638.31 in alleged unauthorized expenditures approved by Appellant.

<u>Urban Children's Coalition</u>	
Overpayment on fringe benefits	8,207.94
Bottled water for staff	375.69
Business coach	625.00
Personal benefit Items	701.88
Janitorial work (no invoices)	434.00
Payment to accounting firm	1,100.00
Director's trip to L.A.	667.91
Director's trip to Portland	864.25
Capital equipment/improvements	<u>7,061.33</u>
	<b>20,037.98</b>

<u>Catholic Charities</u>	
No receipts/supporting documentation	<u>400.24</u>

400.24

Southwest Family Services

No receipts/supporting documentation      32,146.09  
**32,146.09**

Family Preservation

Overpayment of salaries      2,208.00  
No receipts/supporting documentation      15,446.00  
No receipts/supporting documentation      7,959.00  
No receipts/supporting documentation      13,650.00  
**39,254.00**

Cross Community Coalition

No receipts/supporting documentation      50,000.00  
**50,000.00**

Nicholson, Spencer & Assoc.

Training was never provided      9,800.00  
**9,800.00**

(Exhibit G)

25. According to Ms. Orona, the PSSF grant to Cross Community Coalition was the remaining funds that had been part of a \$100,000 grant administered by her when she worked for Mile High United Way. The grant administration was transferred to the Department during the summer of 2001. Ms. Orona further testified Appellant knew nothing about the grant and that he signed as the authorized requestor on her behalf as she was not a permanent Department employee.

26. Ms. Orona testified that the money paid to Nicholson, Spencer & Associates was from unexpended funds designated for training of the PSSF providers. The funds were supposed to cover training in the following fiscal year. This arrangement would not have been a problem if Mile High still handled the PSSF grants. Appellant approved the expenditure based upon the information provided by Ms. Orona. Both Ms. Orona and Appellant testified that Nicholson, Spencer & Associates returned the funds to the Department.

27. After Mr. Gross produced his report, the matter was referred to Frank Waterman, one of the Department's investigators, for further investigation. Mr. Waterman produced a report setting out the following questionable reimbursements approved by Appellant:

1. 6/2/01: check #353 for \$1,000 paid to Hull Associates for review of financial services

2. 8/29/01: check (no #) for \$10.00 paid to Margie Melendez for office expenses. No receipt presented.
3. 8/20/01: check #430 for \$27.47 paid to Sierra Springs for bottled water.
4. 8/29/01: check (no #) for \$13.44 paid to Ms. Melendez for parent class travel. No mileage report presented.
5. 8/20/01: check #437 for \$100.00 paid to Global Communications and Beyond for "coaching."
6. 6/19/01: check (no #) for \$215.00 paid to Sam's Club for two air coolers.
7. 7/16/01: check #383 for \$11.67 paid to Eva Rozack for flowers for board member's husband who was hospitalized.
8. 7/25/01: check #401 for \$25.00 paid to Centro Bienstar San Jose for clearing warehouse subscription.
9. 6/28/01: check #360 for \$25.00 paid to Professional Communication Services for checking phone lines.
10. 7/31/01: check #409 for \$248.10 paid to MTI Paging for pager annual service fee.
11. 6/11/01: \$30.00 payment to Alejandra Aguirre for janitorial services; no receipt, disbursement date or check # recorded for this transaction.
12. 7/31/01: check #410 for \$50.00 paid to Global Communications and Beyond for "coaching."
13. 6/22/01: check #362 for \$50.00 paid to Global Communications and Beyond for "coaching."
14. 7/20/01: check #394 for \$98.31 paid to Enrique R. Orozco for rental car for conference in Portland, OR.
15. 7/20/01: check #393 for \$11.43 paid to Mr. Orozco for parking at DIA for conference in Portland.
16. 7/20/01: check #395 for \$118.21 paid to Mr. Orozco for hotel for conference in Portland.
17. 6/23/01: check #363 for \$133.34 paid to Mr. Orozco for per diem to attend conference in Portland.
18. 7/10/01: payment to Mr. Orozco for parking; no receipt, disbursement date or check number for this transaction.
19. 5/5/01: payment to Cecelia Koolbeck for parking; no receipt, disbursement date or check number for this transaction.
20. 7/31/01: check #406 for \$11.95 paid to Mr. Orozco for AOL Services.
21. 7/31/01: check #405 for \$10.98 paid to Mr. Orozco for AOL Services.
22. 7/23/01: check #397 for \$65.28 paid to Wells Fargo Financial Leasing, Inc., for monthly lease of copy machine.
23. 6/23/01, check #355 for \$43.53 paid to Wells Fargo Financial Leasing, Inc., for monthly lease of copy machine.
24. 8/01: Madelyn Barrera, UCC, presented a request form for

mileage reimbursement on which she claimed that on 8/10/01 she drove 246 miles from UCC, 623 Fox Street, Denver, to 6145 Janice Way, Arvada. An Internet search disclosed that that distance between the two locations to be 12.8 miles. The approximate travel time between the two locations is 23 minutes.

25. 8/20/01: check #439 for \$750.00 paid to Centro Bienstar San Jose for subleasing.
26. 8/14/01: check (no #) for \$139.63 paid to Office Dept for office supplies – Internet order.
27. 7/12/01: check #365 for \$1944.96 paid to Grainger for three air conditioners for the offices.
28. 8/7/01: Check #420 for \$573.40 paid to Computer Consultants for network installation of EPP computers.

(See Exhibit 7, pp. 5-7)

28. Mr. Waterman noted other concerns:

Other Investigative Activities: About 9:40 a.m., 12-13-01, an unscheduled inspection of UCC's office space at 603 Fox St., Denver, in the company of Ms. Pat Rozack, UCC's Administrative Assistant, disclosed the three air conditioners installed in the windows of suite #200, #203 and #204. Further inspection of the premises disclosed one of the two air coolers in question, boxed and secured in suite #203. Ms. Rozack, upon being questioned regarding the missing air cooler state that the item was "on loan, somewhere in the community." Upon further questioning, Ms. Rozack explained that the K Cole wristwatch valued at \$54.95, purchased among other items at Sams (sic) Club on 2-8-01, was intended for, and subsequently provided to Ms. Theresa Alvarez, a former employee, as a graduation/going-away gift. Ms. Rozack, (sic) further explained that Ms. Alvarez, a UCC employee since 7-19-94, acquired a nursing degree and resigned to pursue a nursing career; thus' (sic) the gift.

On 12-14-01, numerous messages left on the reported residential phone of Ms. Alvarez in an attempt to verify her having received the K Cole wristwatch as a gift went unanswered.

About 8:00 a.m., 12-17-01, Ms. Rozack was re-interviewed telephonically and stated that the air cooler in question, (sic) had been returned to the offices of UCC.

On 12-18-01, a follow-up inspection of the offices disclosed the air cooler located in room #203.

On 12-19-01, following a telephonic interview wherein he was questioned regarding the whereabouts of the air cooler during the inspection conducted on 12-13-01, Mr. Enrique R. Orozco, Executive Director, UCC provided a written explanation.

(Exhibit 7, p. 7)

29. Capital improvements and office equipment for general use of the staff are not authorized expenditures under the EPP grant.

30. Appellant testified that he approved the purchase of the air conditioners and air cooler because the weather was very hot and it made the offices more comfortable. According to the report prepared by Mr. Gross, Mr. Orozco told him that Appellant approved the purchase of the air conditioners because it was an improvement to the building where UCC leased office space and, thus, "a betterment to the community." (Exhibit 11, p. 5)

31. The "missing" air cooler had been in the possession of Alejandra Aguirre, the person who provided janitorial services for UCC.

32. Appellant testified that he had not agreed to the purchase of computers for UCC staff because he did not feel it was an appropriate expenditure. Jay Morein approved this purchase. (See, Exhibit 16, back of p. 346) Mr. Morein testified that he agreed to this purchase because the computers would enable the family advocates to keep better, more accurate records. Mr. Morein also testified that he did not approve the use of AOL or the networking of the computers, both expenses that Appellant subsequently approved.

33. Mr. Waterman met with Appellant on December 18, 2001. After advising Appellant of his *Miranda* rights, Mr. Waterman took the following statement, which was reviewed for accuracy and completeness and initialed by Appellant:

Q: On 6-20-01, a check in the amount of \$1,100.00 was paid to Hull Associates on behalf of UCC (Urban Children Coalition) for review of financial statements. Could you explain this expenditure?

A: I don't know what you are talking about. Every month I would receive packages of expenditures from the following four programs: Urban Children Coalition, South West, Family Konnektions and Catholic Charities. If you are asking me if I reviewed every single document in the packages, the answer is no, I did not. I did not think it was my responsibility. Why? Because I was not appointed, assigned, trained, given guidelines or do I have any

expertise in financial management. When I received the first billings from the centers, I sent the packages up to Jay Morein for his approval because I did not consider it my job. Mr. Morein sent the package of billings back to me with the instructions for me to "write approval" on the cover sheet of the package, which I did. I then sent the packages back to him. From then on, whenever I would receive the billing packages for the four entities, I would approve the entire package without itemization. In other words, I did not inspect each request for payment and did not check for receipts. I did not consider it my job to do so because, as I said before, I was not trained in this regard.

Q: Mr. Larry Powell and Ms. Laura Feaster, Family Konnektion stated in a written statement on 12-11-01, that you and Ms. Di Holmes, Director, Family Konnektions (sic) had told them upon being employed that they should estimate the mileage the accrued in the course of their duties and the mileage would be paid later. In addition, they stated than on 8-10-01, you called both of them at their respective residence, and told them that you had obtained a check in the amount of \$1,700.00, which you would provide to Ms. Holmes in order to reimburse them for their accrued mileage. How do you answer to this question?

A: I did tell them to estimate their mileage so that I could have an amount to submit for reimbursement; however, they were not reimbursed because, (sic) they did not provide me with the estimate of their mileage. With respect to a check for \$1,700.00, I don't know what that is all about. I did not tell them that I had a check for that amount or any amount with respect to mileage.

Q: I have a listing of 28 reimbursements made to UCC between 6/01 and 10/01, which upon review, appear to be questionable. Could you offer any explanation with regards to why they were reimbursed?

A They do appear to be questionable; however, as I stated before, whenever I got the billings, I would write "approved by Gabe Oliver" on the cover sheet and send it to Mr. Morein. I did not itemize any of it. Consequently, I cannot offer any explanation.

Q: Do you have anything to add or delete form this statement?

A: The reason for this investigation clearly indicates a lack of proptcol for disbursement within the Family & Children Division. I feel that guidelines must be established. An individual needs to be trained and assigned and have the expertise to monitor the approval or disapproval of expenditures. This person, in my opinion, should be versed

in financial matters and fully dedicated overseeing the financial matters at Family & Children Division. It should not be me or anyone in my capacity. We are program managers' (sic) not financial analyst. (sic) It should be a person trained and assigned by Jay Morein.

(Exhibit 27)

34. Mr. Waterman testified that there is evidence that the Executive Director may have misappropriated the disbursements to Family Konnektions and that the matter has been referred to the Denver District Attorney. Mr. Waterman testified that one of the purchases made by Family Konnektions was \$1,200.00 for a pony allegedly used for photographs of the children. Mr. Waterman was unable to testify as to where the pony currently is.

35. Mr. Waterman testified that there is no evidence that Appellant misappropriated any EPP or PSSF funds.

36. Appellant was given notification of contemplation of discipline on January 11, 2002, for his deficiencies in administering the EPP and PSSF grants. (Exhibit 3) The *Loudermill* hearing was conducted on January 22, 2002. Present for the hearing were Appellant, Kesha Rizzolo, his representative, Dr. Chris Veasey, then-Manager for the Department, and Neils Loechell.

37. Based upon the information presented at the *Loudermill* hearing, Dr. Veasey found that Appellant had violated CSR §§16-50 A. 1), 7), and 20) and 16-51 A. 2), 6), 8) and 11). Dr. Veasey considered the fact that Appellant had been received a five-week suspension for violations of CSR §§ 16-50 A. 8), 10), 18), and 20) and 16-51 A. 4), and 11) on December 16, 2001.<sup>3</sup> Dr. Veasey decided that demotion to Social Case Worker Supervisor, pay grade 809-O, effective February 1, 2002, was the appropriate discipline.

38. Appellant appealed the disciplinary demotion in a timely manner on February 7, 2002.

## **DISCUSSION AND CONCLUSIONS OF LAW**

### *Applicable Rules and Statutes*

CSR Rule 15 is the Code of Conduct for employees in the Career Service.

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<sup>3</sup> The Department presented testimony during the hearing about the prior disciplinary action for the limited purpose of rebuttal to Appellant's claims in the Notice of Appeal of harassment and discrimination. As the hearing progressed, Appellant failed to produce any evidence of either of these claims. The Hearing Officer finds that the existence of the discipline speaks for itself. The underlying facts that led to discipline are irrelevant and immaterial to the issues decided here and the testimony is stricken from the record.

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.
- 6) Carelessness in performance of duties and responsibilities.
- 8) Neglect in care or use of City and County property.
- 11) Conduct not specifically identified herein may be cause for progressive discipline.

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

§19-10 Actions Subject to Appeal

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

- b) Actions of an appointing authority: Any action of an appointing authority resulting in dismissal, suspension, involuntary demotion, disqualification, layoff, or involuntary retirement other than retirement due to age which results in alleged violation of the Career Service Charter Provisions or Ordinance relating to the Career Service, or the Personnel Rules.

*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 (involuntary demotion), the Department has the burden of proof to demonstrate that its decision was within its discretion and appropriate under the circumstances. Appellant, having raised harassment and discrimination as affirmative defenses, has the burden to establish that the Department's decision was either harassing or discriminatory in nature.

Appellant has been charged with violating several provisions of CSR Rule 16. The first of these, 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 (10<sup>th</sup> 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."<sup>4</sup> *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.<sup>5</sup>

"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)<sup>6</sup>

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."<sup>7</sup>

<sup>4</sup> *Miriam-Webster's Collegiate Dictionary*, 10<sup>th</sup> Ed., 1993

<sup>5</sup> *Black's Law Dictionary*, 4<sup>th</sup> Ed., 1951

<sup>6</sup> *ibid.*

<sup>7</sup> *Miriam-Webster's*, *op cit.*

*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.)<sup>8</sup>

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

The Hearing Officer has considered the testimony offered during the hearing and reviewed the extensive documentation submitted by the Department, as well as by Appellant. Based upon all the evidence, the Hearing Officer concludes that Appellant's administration of the EPP grant was grossly negligent, a violation of CSR §16-50 A. 1).

Appellant consistently argued (during the interview with Mr. Waterman, at the *Loudermill* meeting, and during the hearing) that he was not responsible for the review of the documentation submitted for reimbursement, that he was only required to note "Okay, Gabe Oliver" on the ADM 8, as instructed by Mr. Morein, and that someone with an auditing or budget analyst background in the Financial Services area was the only person qualified to review the documentation to make sure that the requests were in compliance with the EPP grants.

The Hearing Officer has concluded that, taken in its best light, Appellant's statements do not establish the level of performance of his responsibilities over the administration of the EPP grant meets the standards for willful misconduct. According to Appellant, he thought he was following instructions by signing his name to a verification that the payments were authorized and that he did not have to make sure that the information he was verifying was correct. This is not willful misconduct because, taking Appellant's argument to its logical conclusion, he was unaware that what he was doing was wrong.

This ingenious argument does not save Appellant. By accepting Appellant's version of events, the Hearing Officer concludes that Appellant was grossly negligent in the administration of the EPP grant. He flagrantly disregarded a "reasonably prudent" course of action by signing the ADM 8's verifications of payments without either understanding meaning of what he was signing or reviewing the supporting documentation.

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<sup>8</sup> *Black's, op cit.*

Appellant claimed that he did not know the terms of the EPP grant contract or what was required of him as the grant administrator. The evidence contradicts this. Appellant was one of the team responsible for the drafting of the terms of grant proposal and the budget for each of the providers. He claimed that he was never trained on how to administer the grant, yet he also testified that he and Mr. Morein held a training session with the four program directors about the documentation needed to support payments. He testified that he did not know the parameters of the grant, but he also testified that he denied the purchase of the computers (subsequently approved by Mr. Morein) because they were an inappropriate expenditure under the terms of the grant.

Even if the Hearing Officer accepted the sincerity of Appellant's justifications, they are not explanations of a "reasonably prudent" grant administrator.

Appellant is not inexperienced or unintelligent. He held the title of Social Case Worker Manager for several years. He has an M.P.A. Yet he approved obviously inappropriate expenditures he should have or would have known about had he taken the time to review the paperwork submitted by the four providers.

Appellant claims that only someone with a background in accounting or budget analysis could make a determination that the payment requests did not meet the terms of the grant. This is not true. The purchase of a graduation gift for a former employee of one of the centers or flowers for a board member's husband or a swamp cooler for an employee's home or management coaching for a program director or a pony clearly do not meet the terms of the EPP grant. While the appropriateness of some of the other expenditures might have met the qualifications of the grant (such as bottled water or an air conditioner if it was for the public areas of the centers), Appellant had a clear duty to review how the money was being spent and that, if he questioned the appropriateness of the request, to ask Mr. Morein, or someone else with a greater financial background than Appellant, to confirm the correctness of the expenditure. Instead, Appellant just chose to sign the verification and look no further. This was grossly negligent. The violation of CSR §16-50 A. 1) has been established by a preponderance of the evidence.

Because the Hearing Officer finds that Appellant's handling of the EPP grant was grossly negligent, his handling of the grant was more than careless. The allegation that Appellant violated CSR §16-51 A. 6) in the administration of the EPP grant is dismissed.

The Hearing Officer accepts the fact that Appellant signed the requests for payment for the PSSF grants based upon information supplied to him by Rebecca Orona without any more knowledge about the terms of the PSSF grant. The Hearing Officer finds that, given the fact that this grant was referred to the Department "mid-term," his approval of the payments to Cross Community Coalition does not meet the standards for gross negligence, willful neglect or even

carelessness.

However, the same does not hold true for the money paid to Nicholson, Spencer & Associates. Appellant had the obligation to make sure that he could authorize payment for services not yet received. Since he was not intricately involved with the development of the PSSF grant (as compared to his involvement with the EPP grant), his failure to find out if he could actually authorize this payment was merely careless, not grossly negligent or willful neglect. The violation of CSR §16-51 A. 6) is substantiated for Appellant's approval of the payment to Nicholson, Spencer & Associates.

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.

While the Hearing Officer believes that Appellant had the capability to administer the EPP grant properly had he bothered to ask reasonable questions about matters he might not have fully understood, there is no evidence that Appellant was not following instructions when they were given to him. In fact, one of Appellant's explanations for his failure to review the documentation was that he was simply following Mr. Morein's instruction to sign the ADM 8 form. While a reasonable person might conclude that Mr. Morein meant Appellant to sign the form after he reviewed the underlying documentation, Appellant apparently did not reach the same conclusion. Appellant's failure to make a reasonable inference from the instructions Mr. Morein gave him does not mean that Appellant was purposely failing to follow instructions. Therefore, the violation of CSR §16-50 A. 7) is dismissed.

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, in a classification description, or in agency or division's published policy and procedures. The Department did not produce any evidence of qualitative or quantitative standards for Appellant's performance. This violation dismissed.

Appellant is charged with a violation of CSR §16-501 8), neglect in care or use of City and County property. This provision is meant to cover allegations that deal with the misuse of property such as cell phones, computers or cars. It does not include the wrongful approval of expenditures by contractors. Since there was no evidence presented that Appellant personally was neglectful in the care or use of City property, this violation is dismissed.

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 alleged both discrimination and harassment in his Notice of Appeal. Appellant has the burden of proof on these claims. Appellant presented no evidence of either discrimination or harassment by Dr. Veasey in his decision to impose a disciplinary demotion on Appellant. These claims are dismissed.

The last issue before the Hearing Officer is the question of the level of discipline to be imposed for Appellant's violations of CSR §16-50 A.1) and 16-51 A. 6). Dr. Veasey decided to demote Appellant based upon Appellant's previous disciplinary history and the seriousness of Appellant's misconduct. The Hearing Officer agrees with Dr. Veasey's conclusion.

While Appellant might not have personally benefited from the funds that were misspent or even misappropriated by the EPP grant recipients, the fact of the matter is that he approved the payment of these monies to them. What concerns the Hearing Officer most is that Appellant blames everyone else, primarily Mr. Morein and Mr. Gross, for his failures. He refuses to accept his own culpability.

He claims that the real problem is that it takes the City a long time to pay its contractors so that he approved the requests quickly, without review, in order that the payments could be made sooner. The Hearing Officer may be sympathetic to the issue of the timeliness of payment, however this does not excuse Appellant's failure to take a few minutes to an hour to review the documentation before signing and submitting the payment request forms. After all, the delay caused by such a review would be one day, at most.

Appellant blames the program directors, too. He repeatedly stated that he told Mr. Morein that the program directors needed a CPA to help them with their bookkeeping. There is no merit in this argument. It does not take a CPA, or even a bookkeeper, to know that gifts for outsiders and former employees, management coaching for a program director, and the purchase of a pony are not appropriate expenditures, or that even if they are appropriate, that some form of documentation, like a receipt, must support the purchase.

Appellant's failures resulted in the Department making tens of thousands of dollars of inappropriate payments to contractors, of which only a few thousand have been recovered. Further, the misspent monies may have to be repaid by the Department to the State. In this time of fiscal constraints, this is a very serious matter.

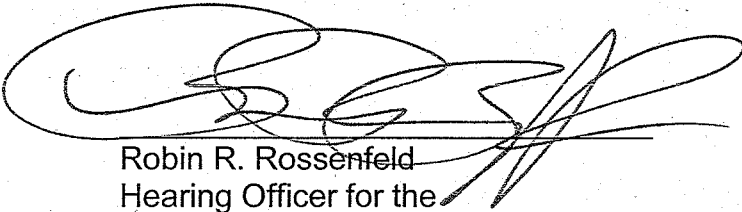
Even more importantly, the children who should have benefited from the EPP and PSSF grants did not receive those benefits. Appellant was charged with administering the grants to benefit the children and their families. His failure to use common sense to fulfill his obligations to these children supports the imposition of

the disciplinary demotion from Social Case Worker Manager to Social Case Worker Supervisor.

**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. 1) and 16-51 A. 6) is AFFIRMED; the Department's determination that Appellant violated CSR §§16-50 A. 7) and 20) and 16-51 A. 2), 8) and 11) is REVERSED and DISMISSED. Appellant's disciplinary demotion is AFFIRMED and the request to be reinstated to his former position and to recover back pay and benefits is DENIED. This Appeal is DISMISSED with prejudice.

Dated this 17<sup>th</sup> day of October 2002.

A large, stylized handwritten signature in black ink, appearing to read 'R. Rossenfeld', is written over a horizontal 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 FINDINGS AND ORDER by depositing the same in the U.S. mail, this 17th day of October 2002, addressed to:

Gabriel Oliver  
5614 West Mexico  
Lakewood, CO 80232

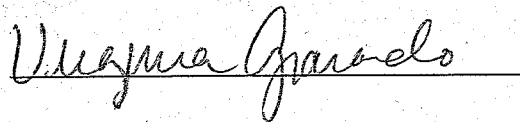
Kesha Rizzolo  
60 So. Holland Street  
Lakewood, Co 80226

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 17th day of October 2002, addressed to:

Niels Loechell  
Assistant City Attorney  
Department of Human Services

Employment Law Section  
Office of the City Attorney

Diana Smith  
Human Resources Department  
Department of Human Services

  
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