

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

Appeal No. 190-03

DECISION

IN THE MATTER OF THE APPEAL OF:

██████████,
Appellant,

vs.

DENVER DEPARTMENT OF HUMAN SERVICES,
Agency,
and the City and County of Denver, a municipal corporation.

I. INTRODUCTION

The Appellant, ██████████, appeals her demotion imposed by the Agency, the Denver Department of Human Services, on November 26, 2003. The Appellant filed a timely appeal on December 4, 2003. A hearing concerning the appeal was conducted on December 14, 15, 16, 19, and 20, by Bruce A. Plotkin, Hearings Officer. The Appellant was present throughout, and was represented by Teresa Zoltanski, Esq. The Agency was represented by Cathy Havener-Greer, Esq., while Chris Mootz, Esq. served as the Agency's advisory witness. Due to confidentiality concerns, the entire hearing was closed, and witnesses sequestered.

Agency's Exhibits 2, 3, and 10 were admitted without objection, while its Exhibits 1, 6 (pp 309-311, 312-315), and 10 were admitted over objection. Appellant's Exhibits L (pp 2-end), O, Q, R, and T-Y were admitted without objection, while her Exhibit N was admitted over objection.

The Agency presented the following witnesses: Roxanne White, Brad Mallon, ██████████, Tom Hill (by telephone, over objection), Bill Bogy, Dave Watts, Phil Shaw, and Sybil Kiskan. The Appellant testified on her own behalf, and also presented the following witnesses: Linda Bergdorf, Rick Miltenberger, Patti Jamison, Lisa Gonzales, and Patricia Hernandez.

II. ISSUES

The Following issues were presented for appeal:

- A. whether the Appellant violated any of the following Career Service Rules (CSR): 16-50 A. 3), 8, 20; 16-51 A. 2), 4), or 11);
- B. if the Appellant violated any of the cited Career Service Rules, whether the Agency had just cause to demote the Appellant;
- C. whether the Agency engaged in unlawful discrimination or retaliation against the Appellant.

III. FINDINGS

A. Jurisdiction.

The issues before the Hearings Officer are within his jurisdiction. CSR 19-10 A. 3., CSR 19-30 A.

B. Pre-Hearing Orders.

Several pre-hearing motions were addressed prior to hearing.

1. Motion for protective order. Matters addressed through testimony at hearing were ordered to be protected under the terms of the Protective Order issued December 1, 2005.

2. Appellant's renewed Motion for Subpoenas and Motion for Continuance. Both motions were denied as untimely, and for failure to comply with previous disclosure requirements.

3. Sequestration and closed hearing. The hearing was ordered to be closed to the public to protect confidential information and to protect the privacy of the participants. Witnesses were ordered sequestered. Each witness was ordered not to divulge confidential and private information elicited at hearing.

4. Agency's Motion to present testimony by telephone.

The Agency requested that its witness, Tom Hill, be allowed to testify by telephone. As cause therefore, the Agency stated Hill was in a severe accident, had multiple broken bones, was confined to a wheel chair after surgery to have pins and rods inserted, and was therefore unable to drive or to move easily to attend hearing. The Appellant objected for failure to prove Hill's invalidism or, in the alternative, to allow her witnesses to testify by telephone. When questioned about the Appellant witnesses'

physical availability, the Appellant did not suggest any of her witnesses was physically unavailable. The Agency's motion was granted, and Hill was allowed to testify by telephone.

C. Post-Hearing Orders.

The parties were ordered to file briefs by December 30, 2005, concerning two evidentiary questions: the admissibility of evidence accepted at hearing concerning a 1995 Colburn Hotel incident involving the Appellant and [REDACTED] as witnessed by Sgt. Watts, see Findings, *below*, and the admissibility of evidence concerning the criminal history of Agency witness [REDACTED]. The Agency filed a timely brief. The Appellant did not file a brief, but on January 12, 2006 filed her "Appellant's Renewed Motion to Strike all Evidence Related to the 1995 Ticket." The Hearings Officer found the Motion concerned the same issues for which the parties were ordered to file briefs by December 30, 2005, and therefore denied the Appellant's Motion as untimely. The "Agency's Trial Brief" concerning the admissibility of evidence is meritorious, the conclusions therein are adopted by the Hearings Officer, and therefore, the Hearings Officer deems the 1995 Colburn Hotel incident relevant and admissible evidence, while the criminal history of [REDACTED] is deemed irrelevant and inadmissible.

D. Background.

The Appellant is employed by the Denver Department of Human Services. Prior to her demotion, and at all times pertinent to this appeal, she was a Technical Support Supervisor of the Child Support Enforcement Division at the Agency. Deputy Manager [REDACTED] was in her chain of command. Roxanne White, Manager for the Agency, was the Appellant's second-level supervisor.

On September 24, 2003, a subordinate to the Appellant, [REDACTED] complained to the Agency Manager, Roxanne White, that she was treated inequitably by Deputy Manager [REDACTED], due to her complaints about [REDACTED]' relationship with the Appellant. As a result of that, and other information from other employees, White initiated an independent investigation into [REDACTED]. As a result of the preliminary findings of the investigation, White expanded the scope of the investigation to include allegations of wrongdoing at the Agency by the Appellant. The investigator, Brad Mallon, concluded the Appellant engaged in wrongdoing based upon her personal relationship with [REDACTED]. The Appellant denied having a personal relationship with [REDACTED] until her pre-disciplinary meeting for this case, in November 2003. The Agency based its discipline of the Appellant principally upon the following five allegations.

On October 13, 1995, a work day for the Appellant, Sgt. Watts, a Denver police officer, observed the Appellant through the open roof of her car, performing oral sex on [REDACTED] in the parking lot of the Colburn Hotel in Denver, where Watts was conducting off-duty surveillance for the hotel. The officer required the two to produce identification. The Appellant provided her driver's license. The picture and information

on the license matched the Appellant. The officer charged the couple with unlawful public indecency. The Appellant's charge eventually was dismissed, and the court record sealed; however, the officer kept a log of his off-duty contacts, and also clearly recalled the incident involving the Appellant.

In June 2000, at a work conference in Vail Colorado, Agency employees Tom Hill and Bill Bogy observed the Appellant sitting on [REDACTED] lap, intimately kissing and caressing in the bar of the hotel where the conference took place. Child support representatives from Denver and other counties were present in the bar. Hill and Bogy work at DDHS as Child Support Enforcement Technicians, but they have never reported to the Appellant. The Agency alleges the Appellant's conduct with [REDACTED] was improper in light of the circumstances.

Phil Shaw, a child support enforcement technician at the Agency, testified he was having lunch in the parking lot of a park along the Platte River, either in 1993 or 1994, when he looked over to another car and observed the Appellant engaging in sex with [REDACTED]. Shaw also remembers seeing the Appellant and [REDACTED] together in a booth at the Vail Conference in 2000, as described by Hill and Bogy, above. Shaw knows both the Appellant and [REDACTED] from work, but reported to neither. Shaw did not report the incident, stating "who would I report it to?" Shaw acknowledged the Appellant always supported his career advancement.

In the spring of 2000, the Agency claimed the Appellant asked a subordinate, [REDACTED], to assist in a deception while she attended a baseball game with [REDACTED]. The Appellant and [REDACTED] had been friendly and their families socialized. The Appellant told [REDACTED] "if [REDACTED] [the Appellant's husband] calls your house [tonight], tell him I'm with you," and asked [REDACTED] to tell her husband the same thing. That evening [REDACTED] ran into [REDACTED] at a bar. [REDACTED] asked "where's [REDACTED], she told me she was with you." After [REDACTED] said nothing, he added "don't worry, [REDACTED], I know where she's at." The next day, the Appellant left a voice mail on [REDACTED] phone to the effect of "you're really a bitch for telling [REDACTED]" and later told [REDACTED] "you're a fucking bitch" The womens' relationship then turned bitter. After the baseball game incident, the Appellant referred to [REDACTED] in derogatory terms up to and including during the investigation leading to the current discipline. Also, after the baseball game incident, [REDACTED] treated [REDACTED] coldly enough to be noticed by the Manager of the Agency. [Exhibit 1 @ "[REDACTED]" tab, also [REDACTED] testimony, White testimony, Appellant testimony].

In August 2001, a few employees from the Agency were selected to attend a national child support conference in New York City. These selections were highly sought, and were awarded based upon pre-determined team-performance criteria. [REDACTED] was not originally part of the committee that chose the criteria, but in April 2001, shortly before the selection, he attended a committee meeting and announced new criteria. [REDACTED] was the highest-ranking employee at that meeting. Shortly thereafter, he announced those selected included the Appellant, much to the chagrin of other team members who assumed they would be attending the conference

after the team-performance results were initially posted, but before [REDACTED]'s intercession.

On November 6, 2003, following the issuance of the findings from the independent investigation, the Agency notified the Appellant that disciplinary action was being contemplated. A meeting concerning the same was conducted on November 14, 2003. The Appellant attended, accompanied by legal counsel, and provided verbal and written responses. On November 26, 2003, the Agency sent notice to the Appellant of her demotion, effective December 16, 2003.

IV. ANALYSIS

The Agency alleges the Appellant's actions, or failure to act, violate the following Career Service Rules:

A. CSR 16-50 A. 3) Dishonesty, including but not limited to...using official position or authority for personal profit or advantage...or any other act of dishonesty not specifically listed in this paragraph.

The Agency claimed the Appellant's violation of this rule derived from the denial of her affair with [REDACTED] in two prior investigations, and regarding her imposition upon [REDACTED] to assist in covering up her affair with [REDACTED]. [White testimony 12-14-05]. White also claimed the affair led to questions about the fairness of the Appellant's acceptance of [REDACTED]'s selecting her to attend the New York child support conference in 2001. [White re-direct testimony 12-16-06].

1. Appellant's denial of an affair with [REDACTED].

In order to find a violation under this rule, a dishonesty must be established, and the dishonesty must have a nexus to the employee's workplace. In re Espinoza, CSA 55-04 (11/30/04), In re Maes, CSA 180-03, 19 (6/9/04). White based her discipline of the Appellant under this section, upon the Appellant's denial of her affair with [REDACTED] in two prior investigations, and a nexus between the dishonesty and the workplace, for treating a subordinate, [REDACTED], improperly, and for using her position for personal profit when she accepted [REDACTED] changing the competitive criteria by which employees were selected to attend the New York City child support conference. [White testimony 12-14-05]. The Appellant replied she was not dishonest as she never denied the relationship, always treated [REDACTED] professionally, and never improperly accepted the invitation to the New York Conference. [Exhibit T, Appellant testimony].

The Appellant admitted she was untruthful about her affair with [REDACTED], when she explained to Mallon during his investigation, "I did not tell about our personal relationship because it was so old and I did not believe it was relevant." [Exhibit T, last paragraph]. She protested the affair ended when she received the 1995 citation at the Colburn Hotel; however the credible observations by Hill, Shaw and Bogy at the 2000 Vail Conference prove the Appellant's affair with [REDACTED] continued for at least five more years. White's conclusion and

Mallon's conclusion that the Appellant was dishonest about her affair with ██████ is therefore sustained.

Regarding a nexus to the workplace, it is apparent that the Appellant's intimate relationship with ██████ caused, at a minimum, a perception of impropriety within the Agency. Shaw testified standards were changed to allow ██████ to attend the 2001 New York conference. The Appellant's conclusion, that Shaw was a gossip and whiner, [Appellant closing statement 12-20-05], was not borne out by the evidence. In addition, Shaw stated the Appellant was always helpful to his career development, thus it was unlikely he had a reason to invent his observations. Bogy stated he found the Appellant's and ██████' behavior at the Vail Conference reflected poorly on the Agency, particularly as many Human Services representatives from other counties were present. [Exhibit 9 @ Bill Bogy tab, Bogy testimony 12-15-05]. Bogy also believed the Appellant accepted an improper benefit in attending the New York conference based upon her relationship with ██████. [Bogy testimony]. The Appellant claimed Bogy was drunk at the Vail Conference bar, but failed to substantiate her claim. She also failed to raise a doubt about Bogy's ability to observe accurately, and failed to establish a credible reason for Bogy to invent his observations, as there had been no animosity between them. Moreover, Hill also perceived that the Appellant attended the New York conference based upon ██████' intervention. *Id.* Thus, at least three employees, plus White and Mallon felt the Appellant improperly benefited from her relationship with ██████. Although these three employees' testimony was credible, their perceptions are insufficient to establish a violation of this rule for reasons stated below, paragraph 3.

2. Appellant's relationship with ██████.

The Appellant was ██████'s supervisor until ██████'s transfer in 2000. After the baseball game incident referenced above where the Appellant's husband accidentally encountered ██████ at a bar, the Appellant admitted she called ██████'s work phone and left a voice mail, calling her a "fucking bitch." [Exhibit 6, p.3]. During Mallon's investigation, the Appellant described ██████, saying "I honestly believe this lady's nuts, she's crazy." [Exhibit 6, p.4]. The Appellant claimed she always treated ██████ professionally, and denied ever treating her poorly, but given the circumstances of her derogatory remarks, the Agency proved by a preponderance of the evidence that the Appellant's abusive comments toward ██████, a subordinate, belied the Appellant's claim that she always treated ██████ professionally, and therefore proved her dishonesty regarding that relationship as it affected the workplace.

3. Criteria for sending Appellant to NYC conference in 2001.

The perceptions of the above-stated individuals, who felt the Appellant improperly accepted ██████' intervention to send her to the New York conference, are insufficient to establish the Appellant dishonestly accepted her selection, as none of them established she was familiar with the selection criteria. However, Shirley Woodrum, a supervisor at the Agency, was a member of the committee that established the original selection criteria. Woodrum tracked the 2000 monthly statistics and had already indicated to various competing team members who should expect to go to New York based upon the past year's performance criteria. ██████ was not part of the committee that set the selection criteria, but Woodrum

stated he interceded in an April 2001 supervisor's meeting to change the selection criteria for only one position, that of the Appellant. Then, in June 2001, he announced the Appellant's selection to attend the New York conference, while, based upon the original criteria, the Appellant's team had the lowest ranking. [Woodrum testimony]. Upon hearing of the changed selection, two of Woodrum's team members had to be given leave as they were too upset to remain at work. *Id.* Woodrum's testimony was unimpeached, and was highly credible. The Appellant's response, that her team had the highest percent of increase in collections from the previous year was consistent with Woodrum's testimony that the criterion cited by the Appellant was the same criterion changed by [REDACTED] for the Appellant's benefit. Therefore, Woodrum's testimony transformed the appearance of impropriety observed by Shaw, Bogy, Hill, and other un-named co-workers, into a clear impropriety on [REDACTED] part. The remaining question is whether the circumstances indicate the Appellant was aware of the impropriety, and therefore knowingly and improperly benefited from [REDACTED] selecting her to attend the New York Conference.

The Appellant had been with the Agency for 27 years prior to her demotion. As a supervisor, she was highly familiar with performance criteria. She was a supervisor during 2000-2001, when criteria were set for selection of employees to attend the 2001 New York conference. Importantly, the Appellant explained at great length the process by which she was selected to attend the New York conference. Her testimony was consistent with that of Woodrum in that both agreed the Appellant was selected based upon the single criterion of percent of increase in collections during 2000, the criterion changed to benefit only one person – the Appellant. No witness testified for the Appellant that any other supervisor approved of [REDACTED] change, while Woodrum described the shock of other committee members at [REDACTED] last-minute intervention. Finally, it has already been established that the Appellant and [REDACTED] continued to have an intimate relationship well-after 1995.¹ The Hearings Officer concludes from these circumstances that the Appellant was well aware of the changed criterion, knew it was [REDACTED] who changed it, and knew it was for her benefit. It was therefore improper for her to use her position as supervisor for personal profit and advantage over others.

The Agency proved the Appellant was dishonest about her affair with [REDACTED], dishonest about her mistreatment of [REDACTED], and improperly used her position for personal advantage, all three of which had a direct and significant impact upon the workplace as described above. The Agency has therefore proven the Appellant violated CSR 16-50 A. 3) by a preponderance of the evidence.

B. CSR 16-50 A. 8) Threatening, fighting with, intimidating, or abusing employees or officers of the City and county of Denver for any reason, including but not limited to: intimidation or retaliation against an individual who has been identified as a witness, as a party, or as a representative of any party to any hearing or investigation relating to any disciplinary procedure, or a violation of a city, state, or federal rule, regulation or law.

¹ See, e.g. Shaw, Bogy, and Hill testimony, Exhibit 1 pp. 12-29, Exhibit 6 interviews, Exhibit 17 and 18 phone records of [REDACTED] and the Appellant.

The same facts above, which established the Appellant's dishonesty concerning her treatment of [REDACTED] also establish a violation of 16-50 A. 8). The Appellant's response, that [REDACTED] spread rumors about the Appellant's affair, was not borne out by the facts: the Appellant's admission of her affair with [REDACTED] rendered the accusation moot. The Appellant's additional claim, that [REDACTED] in some way harassed her, was unpersuasive and not substantiated by the Appellant's witnesses. See testimony of Bergdorf, Miltenberger, and Oliver.

C. CSR 16-50 A. 20) Conduct not specifically identified herein may also be cause for dismissal.

The Agency identified the specific conduct, described above, as its basis for discipline. No other basis for discipline is found. Therefore the Hearings Officer declines to apply this rule.

D. CSR 16-51 A. 2) Failure to meet established standards of performance including either qualitative or quantitative standards.

"Lead and motivate your team by creating an environment in which workers willingly perform their jobs and own their share of responsibility for what happens." Appellant's PEP.

As the Appellant's supervisor, White readily acknowledged the Appellant performed her duties with technical proficiency, but violated this provision in the following ways: the Appellant lacked awareness how her conduct (presumably regarding her relationship with [REDACTED]) affected the unit she supervised, lacked awareness how she was viewed by the state Department of Human Services, failed to consider her professionalism, and failed to consider how her team perceives her. [White testimony].

While White acknowledged the Appellant was generally well-liked by her co-workers and was an effective leader, *see also* testimony of Gray, Lopez, Oliver, Miltenberger, Jamison, the Agency did not articulate how the Appellant failed to lead and motivate her team, how she was detrimental to her subordinates' willingness to perform their jobs, and how her affair with [REDACTED] affected her subordinates' willingness to take responsibility for the performance of the team. Since the Agency did not establish how the Appellant failed in the cited PEP requirements, it therefore failed to establish the Appellant's violation of CSR 16-51 A. 2) by a preponderance of the evidence.

E. CSR 16-51 A. 4) Failure to maintain satisfactory working relationships with co-workers, other City and County employees or the public.

The Agency claimed the Appellant violated this rule by her abusive treatment of [REDACTED]. For the same reasons as found above, regarding CSR 16-50 A. 3), and 8), the Appellant's abusive language and actions toward [REDACTED] constitute a violation of this rule, as well.

F. **CSR 16-51 A. 11)** Conduct not specifically identified herein may also be cause for progressive discipline.

The Agency identified the specific conduct described above as its basis for discipline. No other basis for discipline is found. Therefore the Hearings Officer declines to apply this rule.

V. APPELLANT'S DISCRIMINATION CLAIM

The Appellant bears the initial burden of proving discrimination on the basis of her membership in a protected class. The Appellant failed to establish her membership in any protected class, or any nexus between the Agency's discipline and her membership in a protected class. She therefore failed to establish a *prima facie* case for her discrimination claim.

VI. APPELLANT'S RETALIATION CLAIM

The Appellant claims the Agency retaliated against her for disciplining [REDACTED]. That discipline occurred in October 1999. White was not the Appellant's supervisor at that time, the Appellant failed to establish a link between her discipline of [REDACTED] and any other supervisor, and the time between her discipline of [REDACTED] in 1999, and the investigation undertaken by White in 2003, is too remote to establish or infer causation. For these reasons, the Appellant failed to establish a *prima facie* case for her retaliation claim.

VII. CONCLUSION

The Appellant was entirely correct that the Agency has no business policing private morality. [Appellant opening statement]. This case is not about the fact of the Appellant's affair with another, senior supervisor at the Agency, nor were character and reputation at issue. The Appellant made her private morality a matter for legitimate Agency inquiry when she made professional decisions, engaged a co-worker, and accepted a benefit, not on the basis of what is best for the Agency, but based upon her personal relationship with [REDACTED], without regard to the negative impact her actions had on the Agency. Her actions harmed co-workers, the Agency, and the city, in violation of Career Service Rules.

VIII. LEVEL OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior or performance. CSR 16-10. The degree of discipline depends upon the seriousness of the offense, taking into consideration the employee's past record. *Id.*

As a supervisor, the Appellant is charged with upholding the highest standards of conduct. Instead, her affair with [REDACTED] "pummeled" the Agency for 10 years, [White testimony], by creating resentment within the Agency, by her accepting an improper benefit, and by her disparaging [REDACTED] for five years, all substantial violations of Career Service


Rules. Based on the effect the Appellant's personal decisions had on the Agency, White properly served notice on the Appellant, gave her an opportunity to respond, considered the Appellant's and her representative's comments at their pre-disciplinary meeting, and assessed discipline against the Appellant.

In considering the degree of discipline, White considered the Appellant's clear disciplinary history, and the praise from her subordinates. White's decision to demote the Appellant was within the range of alternatives available to her.

IX. ORDER

1. The Agency's demotion of the Appellant on November 26, 2003, is AFFIRMED.
2. Evidence designated "Confidential" shall remain under seal, pursuant to the provision of the "Protective Order" issued December 1, 2005.

DONE this 13th day of February, 2006.



Bruce A. Plotkin
Hearings Officer
Career Service Board

