

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

Appeal No. 179-04

DECISION

IN THE MATTER OF THE APPEAL OF:

SHEILA ROBERTS,
Appellant,

vs.

DENVER COUNTY COURTS, and the City and County of Denver, a municipal corporation,
Agency.

The hearing in this appeal was held on May 17, 2005 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and represented herself. The Agency was represented by Assistant City Attorney Christopher M. A. Lujan. Having considered the evidence and arguments of the parties, the Hearings Officer makes the following findings of fact, conclusions of law and enters the following order:

FINDINGS AND ANALYSIS

This is an appeal of a three-day suspension of Appellant Sheila Roberts, Court Technical Clerk with the Denver County Courts (Agency). The action dated December 13, 2004 was imposed based upon the allegation that Appellant repeatedly requested another employee to log her onto the County Court Time Clock system before Appellant arrived at work. This timely appeal asserts that the Agency action was unfounded, discriminatory and harassing, and requests rescission of the suspension, among other relief.

The Agency's Exhibits 1 – 10 were admitted without objection. Appellant tendered no exhibits.

I. **NATURE OF DISCIPLINE**

Appellant was given a three-day suspension based upon the appointing authority's conclusion that she had repeatedly asked a fellow County Court clerk to report her as present when she was not at work between July and October 2004, and persisted in those requests even after the co-worker told her she was unwilling to

continue the practice. The Agency charged Appellant with the following specific violations of the Career Service Rules (CSR): gross negligence, dishonesty, and failing to maintain satisfactory work relationships with coworkers.

II. ISSUES

The following issues were presented for decision:

1. whether the Agency proved that Appellant violated the stated Career Service Rules by a preponderance of the evidence by requesting that a coworker log her onto the office time clock when she was not at work; and

2. if so, whether the three-day suspension was reasonably related to the seriousness of the offense in conformity with CSR § 16-10.

III. FINDINGS OF FACT

Appellant is a Court Technical Clerk assigned to a courtroom in Denver County Court. The Agency maintains a time-keeping system which requires all employees to log into their computer using their confidential password as soon as they arrive at work in order to record their start time. Employees were also required to log in and out for lunch, and log out at the end of the day. Appellant signed both memoranda announcing this policy. [Exhs. 9, 10.]

On October 8, 2004, Court Technical Clerk Jennifer Dunn reported to her supervisor Nora Hawkins that on more than ten occasions Appellant had called her from outside work and requested that she log Appellant into the time-keeping clock system. Ms. Dunn did this a few times based on their friendship, but on other occasions she did not because she believed it was inappropriate and violated their work rules. Ms. Dunn asked Appellant to stop making the requests. Appellant did not discontinue the practice despite Ms. Dunn's request to stop. Ms. Dunn became resentful, and decided she would have to report the matter to her own supervisor and ask her to talk to Appellant. Ms. Dunn was relieved when Ms. Hawkins told her she would take care of the situation. [Testimony of Ms. Dunn.]

That same day, Ms. Hawkins reported this conversation to Court Division Manager Ron V. Trujillo. Mr. Trujillo arranged a meeting with Ms. Dunn, Ms. Hawkins and Appellant's supervisor Vivian Duran. At that meeting, Ms. Dunn stated Appellant had made the request approximately ten to fifteen times, and that "when it starts to be on a regular basis, then it gets old." [Exh. 6.] Ms. Dunn asked Ms. Hawkins to speak with Appellant. After the meeting, Ms. Duran audited Appellant's attendance and discovered that she had been tardy eight times between May and mid-September 2004. [Exh. 3, p. 4.]

As a result of these findings, Appellant was notified that the Agency was considering taking discipline against her. At the pre-disciplinary meeting, Appellant

appeared with her representative Barry Roseman, Esq. At first, Appellant stated she did not remember calling Ms. Dunn, who then bore the name Jennifer Graham. Later, Appellant admitted she had asked Ms. Dunn to clock her in on a few occasions when Appellant was already in the parking lot, but that she was not very late at the time. In imposing the suspension, the Agency considered Appellant's statements and her prior discipline, which consisted of a 2003 written reprimand for a performance error resulting in a wrongful arrest, and a one-day suspension in 2004 for being absent from work for two hours without permission. [Exhs. 2, 4 and 5.]

Appellant's Performance Enhancement Plan (PEP) sets a standard of under four failures to use the time clock program per year and under four late starts per year. [Exh. 7, p. 6.] The Code of Conduct for Employees of the Denver County Court prohibits employees from "instruct[ing] others in ways to circumvent the system to gain advantage." In addition, "[n]o court employee shall alter, falsify, destroy, mutilate, backdate or fail to make required entries on any records within the employee's control." [Exh. 8, p. 5.]

Deputy Court Administrator Suzanne Stover testified that the County Court's time policy considers any failure to personally clock in as a falsification of records, and that Appellant, an employee since 1991, was aware of that policy. Ms. Stover believed the three-day suspension was appropriate because the requests to falsify time records negatively affected Appellant's coworker and violated PEP performance standards for Appellant's job. Ms. Stover stated that the Agency believed the next step in progressive discipline, which would have been a two-day suspension, was not appropriate because of the number of and dishonesty inherent in the requests. Mr. Trujillo agreed that the discipline was appropriate because the calls requested a coworker to be complicit in a dishonest act.

Appellant testified that she and Jennifer Dunn had been friends who had frequently lunched and spent weekends together. Appellant admitted she asked Jennifer Dunn to clock her in about three times, and that Ms. Dunn had never mentioned it bothered her. She testified that employees were considered late if they arrived beyond their start time, but that she was not sure the policy prohibited employees from signing in for each other.

IV. ANALYSIS

The Career Service Rules require a de novo hearing of disciplinary appeals. The Agency bears the burden to establish that discipline is proper by a preponderance of the evidence. CRS § 13-25-27.

1. CSR § 16-50 A. 1) Gross negligence or willful neglect of duty

Gross negligence in the performance of duties is shown by a failure to perform that is obviously unreasonable or inappropriate. In re Tennyson, CSA 140-02 (12/26/02.)

Appellant's performance plan established her duty to log in using the time clock program. [Exh. 7, p. 6.] The Agency's Code of Conduct prohibited Appellant from falsifying or backdating entries in her records. [Exh. 8, p. 5.] Appellant signed both memos to indicate her receipt of the policy, which specified, "[u]pon arrival, all employees must clock-in. . . . Please be aware, employees are to clock-in and out at their own workstation. Also, no employee may sign in or out for another employee. Employees found doing this may be disciplined." [Exh. 9.] "Your supervisor will be conducting audits every pay period to assure each person is using the system and those entries are recorded accurately." [Exh. 10.] Appellant was thus on notice that she was required to log in personally, and that any failure to do so could subject her to discipline.

Appellant claims she was not sure the policy prohibited her from having another employee log in on her behalf. In the face of the clear language of the policy, her noncompliance was obviously unreasonable and inappropriate. Moreover, Appellant admitted that she made the requests in order to avoid being counted as late.

Appellant also defended her actions by stating that in the past Ms. Dunn had offered to log her in because she knew "how [Mr. Trujillo and Ms. Duran] are." Appellant said she was not aware the requests bothered Ms. Dunn, whom she described as a good friend with whom she socialized outside the workplace. Even if Ms. Dunn was willing to log in for Appellant, that fact would not render Appellant's request proper. The evidence indicates that Appellant used her friendship with Ms. Dunn to evade the discovery of her tardiness. These repeated requests constitute gross negligence in the performance of Appellant's duties, which include an honest reporting of her hours of attendance as well as daily use of the log-in procedure.

2. CSR § 16-50 A. 3) Dishonesty, including but not limited to: altering or falsifying official records or examination; accepting, soliciting, or making a bribe; lying to superiors or falsifying records with respect to official duties, including work duties, disciplinary actions, or false reporting of work hours; using official position or authority for personal profit or advantage, including kickbacks; or any other act of dishonesty not specifically listed in this paragraph.:

"Dishonesty" specifically includes "falsifying official records with respect to official duties [and] false reporting of work hours." In order to prove dishonesty under the Career Service Rules, the Agency must establish that Appellant knowingly communicated a false statement within the employment relationship. See In re Espinoza, CSA 55-04 (11/30/04.)

Appellant admits she asked Ms. Dunn to log her in to work as present about three times. In turn, Ms. Dunn admits that she did so two or three times, and refused on other occasions. Both parties to the underlying events thus agree that Appellant's work hours were underreported at least twice as a result of Appellant's actions. By this means, Appellant knowingly made a false report of her work hours to her employer. I find the Agency thereby established that Appellant violated CSR § 16-50 A. 3).

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

The Agency proves a violation of this subsection by establishing that Appellant's actions caused an unsatisfactory working relationship with a coworker, other city employees or the public.

The evidence presented in support of this charge is the testimony of Ms. Dunn and Ms. Hawkins. Ms. Dunn testified that she had been Appellant's friend before the series of events leading to this discipline, and upon Appellant's requests had logged her onto the time clock system two or three times. However, as the requests continued, Ms. Dunn became less willing to help Appellant violate the log-in rules. Finally, Ms. Dunn asked Appellant to stop asking her. Appellant ignored Ms. Dunn, and continued to request that she log Appellant in. As a result, Ms. Dunn became upset and sought her supervisor's help to stop the requests. Ms. Dunn testified that after Ms. Hawkins agreed to "take care of it", she felt relief, and hoped the situation would soon be over.

Ms. Hawkins described Ms. Dunn as "a little irate" when the latter reported Appellant's behavior. Ms. Dunn told Ms. Hawkins she thought Appellant should "get up earlier like me" in order to get to work on time. Appellant admitted that their friendship and working relationship have been adversely affected by this matter. Ms. Dunn testified that the requests interfered with her ability to do her own work.

Appellant's behavior in using a friendship to obtain an improper work advantage has had a predictable outcome: both her friendship and her working relationship with her coworker were damaged by the resulting resentment. Appellant assumed the risk of damage to both relationships when she intentionally acted to place her coworker in the position of choosing between their friendship and her obligations to their joint employer, and continued to do so even after Ms. Dunn gave her clear notice of her objections to the requests. I therefore find that the Agency has established that Appellant failed to maintain a satisfactory work relationship with her coworker, in violation of CSR § 16-51 A. 4).

4. CSR §§ 16-50 A. 20) and 16-51 A. 11) Conduct not specifically identified herein may also be cause for dismissal or progressive discipline

The above rules provide that discipline may be imposed even if the misconduct is not specifically defined in any subsection of CSR §§ 16-50 or 16-51. As I have found that discipline is appropriate under specific disciplinary rules, it is unnecessary to reach a determination under the above rules.

5. Claim of Discrimination

Appellant has the burden to establish the existence of a prima facie case of discrimination. McDonnell Douglas v. Green, 411 U.S. 792 (1973). Appellant presented

no evidence that she is a member of any group protected from discrimination under the Career Service Rules. Therefore, Appellant has failed to meet her burden of proof as to her discrimination claim.

6. Claim of Harassment

The Equal Employment Opportunity Commission has defined unlawful harassment as unwelcome actions taken because of an employee's membership in a protected group when "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." 29 CFR 1604.11(a).

Harassment itself is not a basis for discrimination; i.e., it does not substitute as proof of membership in a protected group. Harassment is instead a theory of discrimination which allows an employee to establish harm without proof of an adverse employment action such as discipline or termination. The law of harassment recognizes that it is also discriminatory for an employer to permit the workplace to become so permeated by a discriminatory environment that it "destroy[s] completely the emotional and psychological stability of minority group workers." Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971). See also Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).

Under the Career Service Rules, a claim of harassment is perfected when an employee reports the unwelcome conduct to a supervisor in compliance with CSR § 15-103 B. Only the supervisor's disposition of such a report may be appealed. CSR § 19-10 f).

Here, Appellant has not submitted evidence that she is a member of a group protected from discrimination under the Career Service Rules, or that she perfected her claim of harassment pursuant to CSR § 15-103 B. Therefore, I lack jurisdiction to entertain the claim of harassment made in the appeal.

V. PENALTY

The Agency imposed a penalty of a three-day suspension based upon Appellant's repeated requests of a coworker to log her into her time records, thus falsely indicating Appellant was present at work before her arrival. It considered that Appellant had already received both a written reprimand and a one-day suspension during the fifteen months before this discipline, and justified bypassing a two-day suspension by the severity and frequency of the misconduct, and its adverse effect on a coworker.

Appellant argues that she was the only one disciplined for this type of behavior, and that the discipline was not progressive in nature. She also contends that the discipline subjects her to double punishment for the same offense, since she was rated below expectations for attendance in her October 2004 Performance Enhancement Program Report (PEPR). [Exh. 2; Exh. 7, p. 6.]

Appellant submitted no evidence that the penalty was too severe given the Agency's treatment of similarly situated employees. Moreover, an agency does not impose double punishment by enforcing both its performance standards and the rules governing discipline.

I find the penalty of a three-day suspension is appropriate given the seriousness of the pattern of conduct in which Appellant engaged, as well as its deleterious effect upon her coworker.

ORDER

Based on the foregoing findings of fact and conclusions of law, the suspension issued on December 13, 2004 is hereby AFFIRMED.

Dated this 29th day of June, 2005.

Valerie McNaughton
Hearings Officer for the
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing same in the U.S. mail, postage prepaid, this 29th day of June, 2005, addressed to:

Sheila Roberts
12727 Bellaire Court
Thornton, CO 80241

I further certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing same in interoffice mail this 29th day of June, 2005, addressed to:

Christopher M. A. Lujan
Assistant City Attorney
Litigation Section

Matthew McConville
Denver County Courts