

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

Appeal Nos. 33-08, 34-08

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**DECISION**

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IN THE MATTER OF THE APPEALS OF:

**GREG SAWYER**

and

**BECKY SPROUL**, Appellants,

vs.

**DENVER HEALTH AND HOSPITAL AUTHORITY**,

and

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

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**I. INTRODUCTION**

A. Procedural background.

The Appellants, Greg Sawyer and Becky Sproul, appeal their dismissals from Denver Health and Hospital Authority ("Agency" or "DH") on April 14, 2008, for alleged violations of specified Career Service Rules. Upon stipulation motion, the appeals were joined for hearing. The hearing concerning these appeals was conducted by Bruce A. Plotkin, Hearing Officer, on August 18, 19, 20, November 5, and November 6, 2008. The Agency was represented by Theodore Olson, Esq. and Andrew Volin, Esq., while the Appellants were represented by David Bruno, Esq. Agency exhibits 1-44, 50, 55, 56, 59-62, 64-118, 122, 124-131, 133-146, 148-159, and 160-165, 169-171 were admitted. Appellants' exhibits A-Q, and S were admitted. The following witnesses testified for the Agency: Stephanie Thomas, Tom Kazutomi, Christopher Colwell, M.D., Stephen Jackamore, Mark Scherschel, Eric Edford, James Robinson, Kristen Brooks, Michael Nugent, John Watson, and the Appellants. The Appellants testified on their own behalf during their case-in-chief, and presented no additional witnesses.

B. Agency's pre-hearing motions. Several pre-hearing motions were considered and ruled upon.

1. The Agency's motion to exclude evidence was denied.
2. The Agency's motion to close hearing was denied.
3. Non-party Presbyterian/St. Luke's Hospital's motion to quash its subpoena was granted.

4. The Agency's motion for subpoenas to testify was granted.
5. The Agency's motion in limine to exclude evidence was granted as to evidence acquired after the date of dismissal; however the parties were permitted to make offers of proof as specified immediately below at paragraph C. The Agency's remaining prayer for relief was denied.

C. After-acquired evidence. The Agency proposed to introduce evidence it acquired after the date of the Appellants' terminations as further justification for dismissing them. The Appellants' objection was sustained. [see 8/18/08 Thomas testimony 12:14:51]. However, the parties were allowed to make their offers of proof concerning such "after-acquired evidence" subject to the following instructions: 1. all "after-acquired evidence" must be identified as such prior to its introduction; and 2. no "after-acquired evidence" would be considered in this Decision. I elected to proceed in this fashion so that in the event of an appeal, if the Career Service Board ordered a remand to consider such "after-acquired" evidence, the record would not need to be reopened for additional evidence. Thus, no after-acquired evidence appears in this Decision, but it is part of the record.

D. Use of time stamps. Hearing took place over five days, each of which was recorded separately. For ease of reference, I identified testimony first by date, followed by the witness name, then by the time stamp created by Lognotes© software, which should correspond closely to the time stamp in the compact disk recording.

## II. ISSUES

The following issues were presented for appeal:

- A. whether the Appellants violated any of the following Career Service Rules: 16-60 F., J., L., Y., or Z.;
- B. if the Appellants violated any of the aforementioned Career Service Rules, whether the Agency's decision to dismiss the Appellants conformed to the purposes of discipline under CSR 16-20;
- C. whether the Agency's termination of the Appellants' employment violated the Appellants' due process rights;
- D. whether CSR 16-60 is unconstitutionally vague.

## III. FINDINGS

The Appellants were employed as paramedics by the Agency. Sawyer was employed for 16 years. His entire work history met or exceeded expectations, including the rating of "exceptional" for his last review. Sproul was employed for 13 years as an agency paramedic. She received a suspension in 1995, [Exhibit 69], and a verbal reprimand in 2006, [Exhibit 70], neither of which was related to an issue in this appeal. Her work reviews were all "meets" or "exceeds" expectations. Both

appellants were highly regarded as paramedics and as paramedic trainers by the Agency and by their peers.

Denver Health competes to provide paramedic services with 6 Denver hospitals, 11 metro-area hospitals, fire districts, and a host of private ambulance services, although DH contracts some of its paramedic services to competitors. [8/18/08 Thomas cross-exam 2:08:34]. One aspect of this competition is the provision of paramedic coverage for so-called "special events." "Special event" coverage is paramedic coverage that is outside the 911 system, and includes mainly on-site minor paramedic care and stabilization at large public events prior to transport and care at a specialized facility such as DHMC or another hospital. Private owners or managers of INVESCO Field, the Pepsi Center, Coors Field's private events, and the Colorado Convention Center contract with special event paramedic providers for their events. The city of Denver also hires paramedics for public events such as the Dragon Boat Festival, Cherry Creek Sneak, New Year's eve fireworks, and many other such city events. DH has a right of first refusal to provide paramedic coverage for the City and County of Denver's special events.

In late 2005, DH decided to forgo special event paramedic coverage to the Colorado Convention Center (CCC), Pepsi Center, and other special event venues due to several mounting problems, including customer service problems, [8/20/08 Robinson testimony 1:08:03], staffing problems, and financial problems stemming from the payment of extensive overtime pay to DH paramedics who staffed the special events. [8/18/08 Thomas cross-exam 1:56:02]. Special event overtime pay had accounted for doubling the salaries of the Appellants. [11/5/08 Sawyer cross-exam 4:03:15]. Supervisors were aware of and approved the additional work. As part of the effort to ameliorate customer service problems, and to conserve resources, DH limited paramedic overtime to 15 hours per week. [8/20/08 Robinson testimony 1:12:54], and opted out of most special event services. [8/18/08 Thomas cross-exam 1:56:02].

The Appellants saw an opportunity in the DH cutbacks. They discussed forming a new paramedic company, staffed by current DH paramedics, that would solve DH staffing problems while allowing DH to retain control over other aspects of city-wide paramedic coverage since the new company would call to DH for ambulance transport and follow-up care. Equally important, they hoped the new company would replace their lost overtime earnings. [8/19/08 Schershel testimony 11:01:27; 11/6/08 Sproul testimony 1:39:46]. The Appellants began as, and continued through the date of hearing, to be equal, managing partners of the new company called Elite Medical Specialists (hereinafter "EMS"). [8/20/08 Sawyer testimony 9:09:33; 11/6/08 Sproul testimony 1:39:46].

Paramedics must practice under a medical doctor. At DH, paramedics practice under Dr. Colwell's license. In January 2006, Colwell reported to his supervisor, Chief Operating Officer Stephanie Thomas, that a group of paramedics asked him to be medical director of their new organization. Colwell explained the group, including the Appellants, sought to fill a void by providing paramedic services to special events in Denver which DH did not wish to cover, or had insufficient resources to cover such as

the CCC, DCPA, and Coliseum. [Thomas testimony; Exhibit 19; 8/19/08 Scherschel testimony 10:52:42 ].

Thomas did not approve of the Appellants' idea from the beginning, [see e.g. Exhibit 18-1], but told Colwell if the paramedics wanted to present their idea to her she would consider it. At the time, DH no longer provided paramedic coverage to CCC and the annual stock show due to staffing problems. Thomas was concerned that if the venture were successful, the venues would prefer the Appellants' company to DH and DH wished to re-enter the special event market "at some point." *Id.* The following chronology lists the significant events in the relationship between the Appellants, as EMS member-managers, and DH.

1/19/06. After the Appellants learned DH was rejecting a special events venue at the CCC, they met with the CCC to solicit business for EMS. [Exhibit 153].

1/30/06. EMS incorporated. The Appellants and Mark Scherschel each contributed \$3300 toward start-up costs. [Exhibit 71; Exhibit 7; 8/19/08 Scherschel testimony 9:37:50]. Sproul remained 1/3 member/manager and CEO of the LLC through the date of hearing. [8/19/08 Sproul testimony 1:40:34, 1:52:12, 1:56:18]. Sawyer also remained 1/3 member/manager of the LLC through the date of hearing, and has continuously managed the affairs of the LLC. [8/20/08 Sawyer testimony 8:57:13; Exhibit 14].

2/22/06 The CCC chose EMS for paramedic coverage. [Exhibit 125].

2/28/06 DH formally terminated paramedic coverage for CCC special events. [Exhibits 141-15; 149; 11/5/08 Nugent testimony 9:08].

3/21/06. Thomas, Nugent, and Colwell met with Appellants to discuss their plans for EMS and how it would affect their employment at DH. Thomas expressed strong reservations about the potential for conflicts of interest. [Exhibits 20-22]. The Appellants did not mention their contact with the CCC.

3/22/06 The day after the Appellants met with DH representatives about plans for their new company, EMS entered into a one-year contract with the CCC, to expire 2/28/07. Sawyer represented himself to CCC as the president of EMS. [Exhibit 44; 8/20/08 Sawyer testimony 9:00:11; 8/20/08 Edford<sup>1</sup> testimony 11:21:25]. The terms of the contract called for an automatic renewal of the contract unless cancelled by either party with 60 days notice. Sproul also acknowledged entering into that contract. [11/6/08 Sproul testimony 11:14:19, 1:59:04].

4/5/06. Thomas met with Scherschel to go over the same information she discussed on 3/21/06 with the Appellants. Thomas repeated her concerns about the potential for conflicts of interest. She told Scherschel she was concerned that the Appellants' and Scherschel's loyalties would inevitably shift from DH to their own

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<sup>1</sup> Edford was the Director of Events Safety for Kroenke Sports Enterprises. He had authority to contract for paramedic services at the CCC and at the Pepsi Center.

company.

4/7/06: Sawyer met with Kroenke representatives to discuss the EMS contract with CCC. Sawyer informed CCC representatives that EMS would use Pridemark Paramedic Services to transport patients. When asked why EMS was not using DH, Sawyer replied because there were some conflict of interest problems at DH. During the meeting, Sawyer solicited Kroenke representatives for a contract for paramedic needs at he Pepsi Center. [8/20/08 Edford testimony 11:15:34].

4/13/06. Thomas sent the Appellants identical letters as a follow-up to her meetings with the Appellants and Scherschel on 3/21/06 and 4/5/06. She stated she found the Appellants activities with EMS constituted a conflict of interest. [Exhibits 20-22]. Thomas' letter specified each Career Service Rule and Agency rule of which she found the Appellants in violation. She recognized the effort required to create EMS and requested they respond by April 18, 2006 to decide if they wished to transition out of EMS over a 90-day period or resign from DH. [Exhibits 20, 21; 8/18/08 Thomas testimony 9:58:31].

4/18/06. Sproul replied to Thomas on behalf of all EMS members. [Exhibit 23]. Rather than accept either of Thomas' choices, Sproul replied "[w]e have carefully reviewed the Denver Health and Career rules and policies and we do not believe that we are in violation of the rules and policies cited in your correspondence." [Exhibit 23-2]. In response to Thomas' statement that the Appellants were required to seek advanced approval for any outside employment pursuant to CSR 15-51, Sproul stated that policy has never been enforced. [Exhibit 23-2]. The Appellants' response did not allay Thomas' concerns. [8/18/08 Thomas testimony 9:58:31].

4/23/06. EMS contracted with Presbyterian/Saint Luke's Hospital (PSL) without consulting DH. [8/19/08 Scherschel testimony 10:05:20; Exhibit 108]. Sproul made the initial contact with PSL, and referred the contact to Sawyer, resulting in the EMS-PSL contract. Sawyer signed for EMS as "Member/Manager." [11/6/08 Sproul cross-exam 2:30:42].

5/12/06. After she found out about the EMS contract with CCC, Thomas sent another letter to the Appellants. She stated the EMS contract with the CCC and the Appellants' ownership of EMS were incompatible with their duties to DH. [Exhibits 24, 25]. She presented the Appellants with a clear ultimatum: the Appellants were to terminate their contract with the CCC at the end of the contract period, February 28, 2007. Thomas made it clear the Appellants were not to seek any further contracts in the city and county of Denver without prior approval from her or Dr. Gabow. CRS 16-60 J. The Appellants did not respond to Thomas' 5/12/06 letter.

6/19/06. Thomas followed up her May 12 letter with an additional letter to the Appellants on June 19, 2006, asking them to acknowledge, in writing, their agreement with the terms of her May 12 letters. [Exhibits 31, 32].

6/28/06. Sawyer replied to Thomas' letter by asking to meet with her. A meeting

was then scheduled for 7/7/06. In the interim, the Appellants and Schershel discussed the idea of selling all their shares to relatives, while retaining management control over the company. [8/19/08 Schershel testimony 11:32:52; 8/19/08 Sproul testimony 1:42:49].

6/30/06. Sawyer met with Edford about the EMS-CCC contract. During the meeting, Sawyer, on behalf of EMS, solicited Edford for paramedic services at the Pepsi Center. [8/20/08 Edford testimony 11:24:02].

7/7/06. Thomas met with Sawyer. Sawyer told Thomas EMS was sold. He later confirmed that information by email on 8/24/06, in which he stated "I can assure you that no Denver Health employees are in any way involved in the ownership of the company. The[re] are no conflicts, real or perceived. We look forward to continuing our careers, and our allegiance to Denver Health." [Exhibit 37]. Nonetheless, EMS did not terminate their contract with CCC at the end of February 2007. The contract terms provided for yearly automatic renewal, unless terminated by either party with a 60-day notice. [Exhibit 43-2]. The Appellants did not opt out of their contract renewal with the CCC as required by Thomas in her 5/12/06 letters [Exhibits 24, 25]. In addition, Sawyer discussed with Scherschel selling EMS to Sawyer's father while retaining management control over the company. [8/19/08 Scherschel testimony 10:23:56]. Sawyer told Scherschel that, by selling their shares, they would no longer be in conflict with DH, and if anyone came after them "they could stick it where the sun don't shine." *Id.*

8/10/06. Thomas, Nugent, and others met with CCC representatives to discuss the provision of paramedic services for the Democratic National Convention (DNC) by DH. CCC representatives instructed DH representatives they were to work cooperatively with EMS at the convention center during the DNC. When Nugent asked who the contact person was at EMS, a CCC representative provided Sawyer's business card, [Exhibit 44], which listed Sawyer as president of EMS, contrary to his representation to Thomas on July 7, and later on August 24, that the Appellants no longer owned or managed EMS.

8/14/06. EMS entered into a contract with "Above & Beyond," a car manufacturer show in the parking lot of Coors field. Sawyer signed on behalf of EMS as "member manager." [Exhibit 107]. The Appellants did not seek approval from DH. [8/19/08 Sproul testimony 4:50:25; 8/19/08 Schershel testimony 10:10:04].

8/24/06 Sawyer wrote to Thomas that EMS was sold and added "I can assure you that no Denver health employees are in any way involved in the ownership of the company. [There] are no conflicts, real or perceived." [Exhibit 37].

1/11/07. The Democratic National Convention was awarded to the city of Denver. [8/20/08 Sawyer testimony 10:51:00; Exhibit T].

1/12/07: Sawyer met with Kroenke representatives for the third time. He again solicited business for EMS at the Pepsi Center. [8/20/08 Edford testimony 11:24:02]. Sawyer did not seek advanced approval from DH for his Pepsi Center contact. DH

had no relationship with Kroenke to provide CCC paramedic services at that time. *Id* at 11:31:51].

2/07. DH representatives met with Kronke representatives to explain how DH had improved customer service and to explore taking back Pepsi Center contract for paramedic coverage. [8/20/08 Robinson testimony 1:08:03].

2/28/07. The EMS-CCC contract renewed automatically. EMS took no steps to terminate its contract with the CCC. The Appellant's did not notify DH about the automatic renewal of the EMS contract with CCC.

5/31/07. Sawyer exchanged a series of emails with a representative of the Oktoberfest event in Denver, seeking to solicit business for EMS. Sawyer signed his emails as Marketing Director of EMS. The Appellants did not seek permission from DH to solicit Oktoberfest.

6/20/07. Sawyer wrote to the Denver Zoo, to solicit a contract for paramedic services on behalf of EMS. [Exhibit 50]. Sawyer wrote that EMS is comprised of DH paramedics "who wanted to take special event medical care to the next level." Sawyer acknowledged this phrase touted EMS' ability to improve on DH paramedic care. [11/6/08 Sawyer testimony 9:45:39]. He also wrote "we currently service the Colorado Convention Center." Sawyer signed the solicitation as the "Business Development Coordinator." Neither Appellant asked Thomas or Gabow for permission to solicit the zoo. [Thomas testimony 8/18/08 11:19:25]. In his solicitation Sawyer wrote "Elite Medical Specialists came about from a small group of Denver Health (the old Denver General) paramedics...". Sproul was aware of Sawyer's solicitation on behalf of EMS. [8/19/08 Sproul testimony 4:08:59]. Sproul acknowledged she never spoke to Thomas or Gabow to find out if DH was interested in contracting with any of the venues solicited by EMS. [11/6/08 Sproul cross-exam 2:30:42].

Sawyer believed it was not his responsibility to clear potential conflicts with Thomas or Gabow, rather it was up to DH to notify him if DH decided to solicit particular special event venues in Denver so that EMS could then withdraw from them. [11/6/08 Sawyer cross-exam 9:20: 46, 10:41:06]. This belief was contrary to Thomas' directive to Sawyer, [Exhibit 24], that EMS was required to seek written permission from Thomas or Gabow before entering into actual or apparent conflicting contracts. Sawyer did not seek prior permission before soliciting the DCPA, the Denver Zoo, the Pepsi Center, the Coliseum, Above & Beyond, or Oktoberfest. [11/6/08 Sawyer cross-exam 9:31:04]. Sawyer never approached Thomas or Gabow about his disagreement with Thomas' definition of what was direct competition with DH. [*Id* @ 9:40:38], nor did Sproul. [11/6/08 Sproul cross-exam 2:30:42].

8/10/07. Thomas, Nugent and others met with CCC regarding DH's interest in providing paramedic services during the DNC. CCC representatives told them they were using EMS, and would require DH to coordinate their paramedic services with EMS during the DNC. The CCC representative handed Nugent Sawyer's business card as the contact at EMS. Sawyer's card identified him as president of EMS.

[8/18/08 Thomas testimony 11:04:29, Exhibit 44]. Nugent then ordered Sawyer not to attend the following meetings with the CCC as an owner or manager of EMS since to do so would have meant DH would have to share pricing information with EMS as a competitor, and would have to coordinate 12-hour shifts at the DNC, and consequently at DH, with its employee - Sawyer. Sawyer replied to Nugent "Don't worry, I've got it covered." [Nugent testimony].

11/07. DH signed a contract with the CCC to provide paramedic coverage during the DNC. The contract required DH to cooperate with EMS. [Exhibit T, p.2].

2/5/08. DH contracted with CCC to provide paramedic services during the DNC. [Exhibit 84]. CCC required DH to work cooperatively with EMS in the provision of paramedic coverage. [Exhibit 84-02]. This provision required DH to use EMS personnel in scheduling coverage during the DNC.

3/11/08. DH issued letters to the Appellants in contemplation of discipline. [Exhibits 3, 4].

3/31/08. Separate pre-disciplinary meetings were held for the Appellants. The Appellants' attorney represented the Appellants at each hearing.

4/14/08. The Appellants were dismissed from employment. [Exhibits 1, 2].

4/29/08. The Appellants filed separate appeals which were consolidated for hearing.

#### **IV. ANALYSIS**

##### **A. Jurisdiction and Review**

Jurisdiction is proper under CSR §19-10 A. 1. as a direct appeal of the Appellants' dismissals. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

##### **B. Burden and Standard of Proof**

The Agency retains the burden of persuasion, throughout the case, to prove the Appellants violated one or more cited sections of the Career Service Rules, and to prove its decision to terminate the Appellants' employment complied with the purposes of discipline. CSR 16-20. The standard by which the Agency must prove its claims is by a preponderance of the evidence.

##### **C. Career Service Rule Violations**

###### **1. CSR 16-60 F. Using Official Position or authority for personal profit or advantage, including kickbacks.**

The Agency claimed both Appellants violated this rule. It claimed Sawyer solicited special event venues in which EMS touted its paramedics' experience with DH, including the Appellants' procuring a contract with the CCC. The Agency also claimed Sproul was aware of Sawyer's solicitations those venues, [8/18/08 Thomas testimony 12:03:39]. The Appellants' letters of solicitation referred to their DH experience in their solicitations. [see, e.g., Exhibit 109].

A simple reference to one's employment experience is insufficient to violate this rule. A more significant link between one's official position or authority, and seeking an advantage to which one is not otherwise entitled, is required. For example, in In re Mergl, CSA 131-05, 4 (3/13/06) (decided under former CSR16-50 A. 3), a deputy sheriff asked for professional courtesy to avoid being arrested for a crime. In In re Redacted, CSA 190-03, 7 (2/13/06) (decided under former CSR 16-50 A. 3), an employee, whose team won a trip to attend a coveted out-of-state conference, knew that the supervisor with whom she was having an affair, changed the selection criteria at the last moment to ensure her team would win. If the rule were enforced on the basis alleged by the Agency, no employee could submit their present experience in a resume, while currently employed as a Career Service employee, without violating this rule. Such an overbroad application was surely not intended by the rule.

**2. CSR 16-60 J. Failing to comply with the lawful orders of an authorized supervisor or failing to do assigned work which the employee is capable of performing.** [Formerly CSR 16-51 A. 7), 10)].

A violation of the first part of this rule is established by proof that (1) a supervisor communicated a reasonable order to a subordinate, (2) proof the subordinate violated the order (3) under circumstances demonstrating willfulness. See In re Dessureau, CSA 59-07, 7 (1/16/08), *citing* In re Diaz, CSA 13-06, 4 (5/31/06); In re Conway, CSA 40-05, 3 (8/17/05). Thomas gave the Appellants three direct orders. On April 13, 2006, Thomas wrote to each Appellant to sever their ties with EMS within 90 days if they wished to remain DH employees [Exhibits 20, 21]. On May 12, 2006 Thomas wrote each Appellant again, and gave two direct orders: "if you wish to compete for other venues within the City and County of Denver, you must request and obtain prior written permission from Denver Health's CEO, Patricia A. Gabow, MD. or me, as Dr. Gabow's authorized designee." Thomas also ordered the Appellants not to renew its contract with CCC. "EMS will not renew its contract with the CCC upon the expiration of the initial term in February 2007." The Appellants acknowledged receiving these three directives. They also acknowledged they did contact other venues within Denver without seeking prior approval, and also acknowledged they allowed the EMS contract with the CCC to renew after its February 2007 expiration.

The Appellants' argument here, and underlying their entire defense, is that none of the venues they solicited were in conflict of interest with DH, and therefore were fair game. In terms of the elements of CSR 16-60 J., the Appellants claim Thomas' order was inherently unreasonable, since DH demonstrated no intent to seek or re-seek contracts for the venues solicited by EMS. Indeed, DH withdrew from special event

coverage at the CCC, [Exhibit Q], and the Coliseum. [8/18/08 Thomas cross-exam 1:56:02].

First, with respect to the Appellants' argument that Thomas' directives were inherently unreasonable, case law supports the Agency's regulation of outside employment in the manner ordered by Thomas.<sup>2</sup>

Second, the Appellants' argument is misleading with respect to INVESCO Field, and the Pepsi Center, where DH was simply underbid by a competitor. [8/18/08 Thomas cross-exam 1:56:02]. Neither venue has sought new bids for paramedic services since DH's withdrawal, [*id*], so the Appellants' claim that DH has not sought those venues misstates the situation.

The consequences of the Appellants' failure to obey Thomas' order to withdraw from the CCC contract after February 2007, demonstrates the reasonableness of Thomas' order. When DH was awarded the paramedic contract for the DNC, DH was required to work cooperatively with its new competitor - EMS. It was to avoid just such a direct conflict that Thomas issued her order for the Appellants to withdraw from special event venues in Denver. The conflict that arose due to the EMS contract with the CCC contracts demonstrates that Thomas' directive was rational, necessary, and proper. The Appellants' failure to withdraw from their contract with the CCC after February 2007 after being directed to do so demonstrates they willfully ignored Thomas' order in violation of CSR 16-60 J.

The Appellants also argued they were not obligated to seek authorization from DH before soliciting Denver special event venues because Nugent told the Appellants it was not required. [11/6/08 Sproul testimony 2:13:15; 11/6/08 Sawyer cross-exam 9:31:04]. Given the Appellants' acknowledgment that Thomas is a higher-ranking supervisor than Nugent, it is not credible, even if Nugent made such assertions, that the Appellants believed Nugent's representations trumped Thomas' explicit directives. [See Exhibits 20, 21, 24, 25]. In addition, the Appellants' failure to raise such an important defense at their pre-disciplinary hearings makes it less likely Nugent made such a representation. Finally, Nugent denied he gave such permission. Nugent's credibility is equal to that of the Appellants since he no longer worked for DH at the time he testified, and therefore retained no incentive to fabricate testimony.

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<sup>2</sup> In Dalton v. City of Russellville, 290 Ark. 6-3, 720 S.W. 2d 918 (1986), the court upheld the discharge of a police officer for violating a department rule for all outside employment to be approved by the chief in writing. The officer was hired to investigate a civil rights violation by another police department without first seeking approval. In Johnson v. Trader, 52 So. 2d 33 (FL 1951), the court determined police regulations which prohibit any outside employment "inconsistent, incompatible, or in conflict with" work duties prevented an officer continuing his liquor store business, where, notably the officer was given 90 days to choose either his liquor business or to dispose of his liquor business and continue his police employment. The Agency's offer in the present case was even more generous, permitting the Appellants to keep their employment during their 90 day consideration. An agency's interest in the efficiency of public employees is particularly strong in public safety employment because of the need for employees to act quickly and effectively to protect life, limb and property, thus a requirement to seek advance approval for outside employment in these areas is generally upheld as rationally related to this legitimate and substantial governmental interest. Phillips v. Hall, 447 N.E. 2d 418 (D. Ill. 1983). Regulations concerning outside employment in other areas are generally upheld if the agency deems the outside employment interferes with the performance of duties, as long as the prohibition is not malicious, capricious or arbitrary. See generally, Validity, construction and application of regulations regarding outside employment of governmental employees or officers, 72 A.L.R. 5<sup>th</sup> 671 (1998).

At their pre-disciplinary hearings, the Appellants offered to transfer their EMS contract with the CCC to DH, subject to the 60-day cancellation notice requirement contained in the EMS-CCC contract. [11/6/08 Sproul testimony 1:19:27]. Their offer does not obviate the conflict of interest that precipitated it. The Appellants' offer to transfer their interest in the contract with the CCC is evidence they recognized that their contract with CCC created a conflict of interest, demonstrating the lawfulness of Thomas' repeated orders to withdraw from their contract with the CCC. For reasons stated here and above, the Appellants willfully ignored Thomas' lawful orders in violation of CSR 16-60 J.

**3. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules.** The Agency claimed the Appellants violated the following written regulations.

a. **4-112** Denver Health Employee Principles & Practices [Exhibit 38].

Thomas stated the applicable provisions of this Agency rule were as follows.

(1). **4-112 Practice.** "Employees should comply with both the letter and spirit of this policy and the integrity program Code of Conduct and strive to avoid situations which create the appearance of impropriety. [Exhibit 38-1].

Thomas found the Appellants both violated this provision by failing to come forward regarding their ownership and management roles with EMS, and by failing to comply with the instructions in her letters. [8/18/08 Thomas testimony 12:06:29].

Practice Standard 4-112 is aspirational, as indicated by the terms "should" and "strive to." Thus, this particular provision does not set forth compulsory standards of which the Appellants were in violation.

(2). **4-112 5.a.** [each person shall a]void actual or potential conflicts of interest including the appearance of a conflict of interest, except as authorized by this principle or other principles of the Board of Directors. [Exhibit 38-3].

I have found, above, that both Appellants were in direct conflict of interest with DH when they continued their contract with the CCC after February 2007. [see Analysis, above, at CSR 16-60 J.]. For the same reasons, the Appellants were in violation of this Agency standard.

(3) **4-112 5.g.** [Each person shall n]ot engage in outside employment except as may be expressly authorized by Principles and Practices of the Authority (Reference #4-125). No person shall hold a public office or employment which is incompatible with the duties and obligations owed by such person to the Authority. [Exhibit 38-3].

The Agency's proof that the Appellants violated the first sentence of this provision derives from proof acquired after their dismissals related to Denver Health Employee Principles & Practices §4-125. For that reason, I find this claim irrelevant and do not consider the evidence for it here.

As to the second sentence, regarding whether the Appellants' roles with EMS were incompatible with their duties and obligations to DH, it is axiomatic that the Appellants, as every Career Service employee, owed their primary duty of loyalty to their employer. Their continued contractual relationship with the CCC forced Nugent, during the DNC, to share DH pricing and scheduling information with the Appellants - information to which they had no right as Nugent's subordinates at DH. For that reason, the Appellants' refusal to discontinue their contractual relationship with the CCC was incompatible with their duty of loyalty to DH in violation of 4-112 5.g.

(4). 4-112 5. j. [Each person shall promptly report to his/her supervisor any situation in which such person reasonably feels that he/she may be or may become involved in a conflict of interest, whether or not such situation is specifically described in this principle.

The Appellants freely admitted they failed to seek approval from Thomas or Gabow before soliciting business for EMS from a multitude of special event venues, including the DCPA, the Denver Zoo, the Pepsi Center, the Coliseum, Above & Beyond and Oktoberfest. [See Findings, above]. Most notably, they failed to seek approval from DH before soliciting the CCC, and failed to withdraw from that contract after being ordered to do so by Thomas.

The Appellants' position focuses on the "reasonably feels" requirement. The Appellants state their solicitation of those venues was not a conflict of interest, because DH's withdrawal from special event coverage makes it inherently unreasonable to restrict them from pursuing those venues. More specifically, the Appellants state that when DH withdrew from specified special events, there was no actual conflict, so that stating there was a conflict would be unreasonable. Consequently, there should be no obligation to report a non-conflict under this rule.

The Appellants' position is only half correct. While an argument could be made that, for those special event venues relinquished by the Agency, the Appellants' solicitations were not in actual (i.e. present) conflict, the prohibition does not end there. The prohibition applies prospectively to the solicitation of those situations which "may" become a conflict of interest. Thomas' stated desire to re-enter those venues vacated by DH could, reasonably, become such a conflict.

The Appellants' response to Thomas' position, immediately above, was that the Agency may not indefinitely prevent them from soliciting, because such is an illegal restraint of their ownership of EMS. [Appellants' opening and closing statements]. Without citation to legal authority, it was not apparent what legal defense was intended. While covenants not to compete in the private sector are disfavored, and must be limited in time and place, [C.R.S. § 8-2-113], there is no such restriction in the

non-contractual world of public employment. The Appellants failed to produce any legal authority that indicates otherwise. The Agency's choice, to require prompt reporting of actual or potential conflicts, is entitled to deference.<sup>3</sup> Consequently, the Appellants' failure to report promptly their solicitation of special event venues was a violation of Denver Health Employee Principles & Practices) 4-112 5. j.

(5). **4-125.** Employment at Other organizations:

2. Employees may not conduct any business related to other employment while on duty at any Denver health facility or property. Nor may property, equipment, utilities or materials of Denver Health be utilized to carry out or complete any duties or business related to any entity other than Denver Health.

The only evidence advanced by the Agency to prove this violation was acquired after the Agency terminated the Appellants. I deem such after-acquired evidence as irrelevant. Without evidence which is contemporaneous to, or pre-dates, its discipline of the Appellants, the Agency cannot prove the Appellants violated this Agency rule.

(6). **4-112 7.b.** ...Failure to disclose or to resolve conflicts may be grounds for disciplinary action up to and including dismissal of an employee.

This Agency rule places an affirmative burden on its employees to disclose, and to resolve, conflicts of interest. Thomas found this provision put the Appellants on notice of the consequences of their failure to avoid and divulge conflicts of interest. [8/18/08 Thomas testimony 12:06:29]. Sawyer acknowledged he was required to raise even potential conflicts of interest with Thomas. [8/20/08 Sawyer testimony 9:52:50]. He tempered this admission by stating no other DH paramedic was required to disclose outside employment in advance. However, none of the other paramedics [cited by Sawyer], engaged in activities which could reasonably be considered in potential conflict with their DH paramedic activities.<sup>4</sup> Consequently, Sawyer's admission is sufficient to prove his violation of this rule. He also violated this rule when he informed Thomas that EMS was sold, resolving all conflicts, when it was not. [Exhibit 37]. Sproul believed §4-112 did not apply to the Appellants because, none of EMS's solicitations were incompatible with DH. [11/6/08 Sproul testimony 11:14:19].

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<sup>3</sup> See Michelle L. Lehmann, J.D., Annotation, Validity, construction and application of regulations regarding outside employment of governmental employees or officers, 62 A.L.R. 5<sup>th</sup> 671 (1998). "The court in Bell v. District Court of Holyoke, 314 Mass. 622, 51 N.E. 2d 328, 150 A.L.R. 126 (1943)...upheld the validity of a rule providing that no member of the fire department should, during his off-time duty, enter the employ of any person, firm, or corporation without permission of the board of fire commissioners, upon finding that the rule was reasonable ... if the rule is harsh, stated the court, it is for the individual to determine whether he or she will subject him- or herself to its terms by becoming a member of the department. Declaring that the right to work for the public was privilege which may be granted on any conditions which the public agency may impose consistent with the law and public policy, the court reasoned that an individual entering such employment impliedly surrendered certain natural rights which would have remained his if he were a private citizen." A.L.R., *supra*, citing Huhnke v. Wischerm, 271 Wis. 66, 72 N.W. 2d 915 (D. Wis. 1955).

<sup>4</sup> For example, Tom Kazutomi works as the EMS coordinator at Rose Medical Center. He sought and received approval from DH to work at Rose. [8/18/08 Kazutomi testimony 3:42:00]. James Robinson was an instructor at different institutions outside DH. He received advance approval from DH to do so. [8/20/08 Robinson testimony 1:04:00]. In contrast, neither Appellant sought prior approval and their activities were in direct conflict with DH, or reasonably had the potential to conflict with DH.

Such an *ipse dixit* assertion is unconvincing.

**b. Integrity Program Code of Conduct [Exhibit 40].**

**(1). 4. Conflict of Interest and Marketing**

- Profiting financially from sources outside of Denver Health because of your role at Denver Health.
- Spending work time on activities other than Denver health activities.

Thomas testified at hearing that both Appellants violated the first provision without stating why. [8/18/08 Thomas testimony 12:14:51]. To the extent that the Agency believed the Appellants violated this rule by their alleged use of DH property for the benefit of EMS, or by spending work time on EMS activities, that evidence was acquired after discipline, so I do not consider it here.

The Agency may also be claiming that the Appellants violated this rule by using their DH credentials to solicit business for EMS. If so, the claim is essentially the same as the Agency's claim, above, regarding CSR 16-60 F., using official position or authority for personal profit or advantage. For reasons stated above, the Agency failed to prove either Appellant violated this rule by a preponderance of the evidence.

- If you think an action may be a conflict of interest you must disclose this to your supervisor.

Thomas found both Appellants violated this provision without stating why. [8/18/08 Thomas testimony 12:14:51]. Since this statement depends upon the subjective belief of the employee, then without an admission, the Agency cannot prove a violation. The Appellants did not accommodate the Agency by making such an admission, thus the Agency failed to prove the Appellants violated this provision.

**4. CSR 16-60 Y. Conduct which violates the Rules, the City Charter, the Denver Revised Municipal Code, Executive orders, or any other applicable legal authority.**

This rule serves two functions. It serves as a catchall provision for wrongdoing under the Career Service Rules which an agency did not specify elsewhere in its notice of discipline. In addition, CSR 16-60 Y bootstraps notice of wrongdoing, under other authority, into the Career Service Rules.

While not stated in her letter dismissing the Appellants, Thomas testified the Appellants violated CSR 15-51, Outside Employment Policy, and a related provision of the Denver Revised Municipal Code (DRMC). Those provisions state, in pertinent part, as follows.

Any employee desiring to take outside employment or engage in other business activities must submit a written request to his or her appointing authority before the outside employment or business activities commence... nor shall the outside employment or business activities create an actual or apparent conflict of interest.

CSR 15-51.

(a) [A]ll employees shall report existing or proposed outside employment ... or other outside business activity annually in writing to their appointing authorities and obtain his or her appointing authority's approval thereof prior to accepting initial employment or outside business activity.

(c) An officer or employee who has received the written permission of the appointing authority may engage in outside employment or other outside business activity.

D.R.M.C. § 2-63.

The Appellants admitted they did not request permission in advance before soliciting several special event venues. Their admissions constitute a violation of both CSR 15-51 and DRMC 2-63. For reasons stated above, the Appellants' claim that other paramedics did not seek approval before commencing approved activities outside of DH is unconvincing.

**5. CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.**

To sustain this violation, the agency must prove the Appellants' conduct hindered the agency mission, or negatively affected the structure or means by which the agency achieves its mission. In re Simpleman, CSA 31-06, 10 (10/20/06).

Thomas believed the Appellants violated this rule "because their activities put DH at a disadvantage," and because EMS promoted itself to special event venues in Denver as demonstrated by Sawyer's solicitation letters, Exhibits 109, 115, and 122. [8/18/08 Thomas testimony 12:18:27]. Without stating more, this evidence is too vague to establish a violation of CSR 16-60 Z. It is not apparent what other evidence may have established either element of the violation. The Agency, therefore, failed to establish that either Appellant violated this rule.

**D. APPELLANTS' CLAIMS**

The cornerstone of the Appellants' defense is that, while they did not comply with Thomas' orders to seek advance approval from her or Gabow before soliciting special event venues in Denver, they were not legally obligated to do so. Without legal

justification for this premise, the Appellants are left without a defense to the Agency's claims. Thus it is important to analyze the Appellant's legal and factual claims.

1. Privacy rights: The Appellants' claim here is that, by restricting their right to own and operate a paramedic service in Denver outside their DH working hours, the Agency unlawfully regulated the Appellants' ownership or proprietary interests, in violation of their privacy rights. [Appellants' opening statement, closing statement]. The Appellants did not cite any specific authority for this proposition.

The right to privacy for public employees does not extend to a public employee soliciting business in the same domain as that of the employer. Privacy protection in public employment arises mostly in cases where an employer assesses discipline for an employee's extra-marital affair or in cases of co-worker dating. [See, e.g. Causes of Action 2d 139, (2008) especially § 19]. This claim, then, is simply inapplicable as a rebuttal to the rule violations found, above.

2. Actual or apparent authority.

The Appellants claim Nugent had actual or apparent authority to grant Appellants permission to solicit special event venues so that Appellants complied with Thomas' directive to obtain advanced approval before soliciting special event venues in hundreds of conversations with Nugent. [Appellant closing argument]. First, Nugent, whose credibility I found equal to that of the Appellants, denied he gave such permission. Second, if the Appellants perceived Nugent had authority to represent DH in granting them authority to solicit special event venues in Denver, Thomas' explicit letters should have disabused them of such a notion. Their belated offer to transfer their interest in the CCC contract back to the Agency during their pre-disciplinary hearings, [Appellants' opening statements, Appellants' Amended Pre-hearing Statement, p.3], fails to overcome their violation of the previously specified rules. This claim, therefore, also fails to rebut the Agency's proof of their violations.

3. Due Process

The Appellants' claim here is the Agency charged them with multiple Agency rule violations, under CSR 16-60 L., and multiple sub-parts of CSR 16-60, i.e., 16-60 F., J., L., Y., Z. The Appellants claim they were unable to prepare adequately for hearing. [Appellants' Appeals, p.3 @ paragraph G]. This claim is without merit. The Agency's letters in contemplation of discipline were sent to the Appellants on March 11, 2008. The Appellants attended their pre-disciplinary meetings with legal counsel on March 31, 2008 and did not complain that more time was required, or that the charges were unclear. They were represented by counsel at hearing, beginning August 18, 2008. The Agency's claims were not unduly complex, overly voluminous, or otherwise unclear such that the Appellants were denied adequate notice of the claims against them in violation of their notice rights under CSR 16-40.

#### 4. Constitutionality of CRS 16-60

The Appellants claim CSR 16-60 is unconstitutionally vague, overbroad, or ambiguous. [Appellants appeals, p.4 @ H. Hearing officers are without jurisdiction to rule on the constitutionality of the Career Service Rules. [See, e.g., In re Ray, CSA 57-06, 3 (12/4/06)]. A hearing officer's authority is limited, by the Career Service Rules, to affirming, modifying, or reversing agency action based on findings made after a hearing on the merits of an appeal. CSR §19-55.

### V. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-20 to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20.

#### A. Severity of the offenses.

The Appellants disobeyed Thomas' clear, direct, and reasonable orders. They solicited special event venues without informing DH. They explored ways to evade Thomas' directive not to own or operate a company that functioned in direct competition with their primary employer. Sawyer informed Thomas that the Appellants were in full compliance with her directives when it is clear they were not. These violations of a superior's direct, reasonable and clear orders, and their breach of their ethical duty to avoid conflicts of interest with their employer were egregious violations not justified under Career Service Rule or under law. While Sawyer led EMS in the improper solicitation of, and contracting with, special event venues in Denver, Sproul was fully aware of, and approved, those solicitations and contracts as the Chief Executive Officer, notwithstanding her claims to the contrary. Thus both were equally culpable for the violations alleged.

#### B. Past records.

The Appellants' past records indicated they performed their duties well, and even in exemplary fashion. When an employee's violations of a Career Service Rule are egregious, even an exemplary work history may not protect the employee from dismissal.

#### C. Penalty designed to achieve compliance with the Career Service Rules.

From early in their EMS activities through hearing, the Appellants' actions and testimony denied wrongdoing and made it evident they chose to seek their fortune through EMS rather than to comply with their ethical and Career Service duties as DH paramedics. They continue to own and operate EMS, contrary to Thomas' reasonable directives. It is therefore apparent that a lesser penalty would not achieve their compliance with the Career Service Rules.

D. Other considerations.

The evidence leaves little doubt that, during the formative period for EMS, the Appellants intended not only to replace lost overtime pay when DH management re-evaluated its paramedic coverage, but they also intended to work cooperatively with DH to the largest extent possible. The spirit of cooperation dissolved, however, as Thomas continued to express concern about conflicts inherent in the Appellants' new enterprise.

Increasingly, the Appellants evaded, rather than cooperated with, DH management. Sawyer expressed the final rupture of the Appellants' cooperation with DH with his remark that if DH was unhappy with EMS "they could stick it where the sun don't shine."

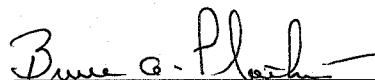
A hearing officer must not disturb the agency's determination unless it is clearly excessive or based substantially upon considerations unsupported by a preponderance of the evidence. In re Delmonico, CSA 53-06, 8 (10/26/06). Thomas considered the severity of the Appellants' conduct, their past records, and considered the possible alternative degrees of discipline pursuant to CSR 16-20. Her determination that the Appellants should be dismissed was not made lightly. She gave the Appellants ample warning, provided them with notice of the precise nature of their violations, and provided ample opportunity for them to come into compliance, which they willfully refused to do. Under these circumstances, her decision was not excessive, nor was it based substantially upon considerations unsupported by a preponderance of the evidence.

**VI. ORDER**

A. The Agency's dismissal of Greg Sawyer from employment on April 14, 2008, is AFFIRMED.

B. The Agency's dismissal of Becky Sproul from employment on April 14, 2008, is AFFIRMED.

DONE January 27, 2009.



Bruce A. Plotkin  
Hearing Officer  
Career Service Board