

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

Appeal No. 159-02

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEAL OF:

RICKEY E. STOCKTON, Appellant,

Agency: DEPARTMENT OF GENERAL SERVICES, PUBLIC OFFICE BUILDINGS,
and THE CITY AND COUNTY OF DENVER, a municipal corporation.

INTRODUCTION

This matter comes before the Career Service Board on appeal by Rickey E. Stockton filed September 4, 2002. Appellant challenges the Department of General Services, Public Office Buildings' decision to suspend him for one week without pay for failing to eliminate sexually suggestive magazines from the workplace after he was appointed as Acting Supervisor.

For purposes of this Decision, Mr. Stockton shall hereinafter be referred to as "Appellant." The Department of General Services, Public Office Buildings, shall be referred to as "POB" or "the Agency." The rules of the Career Service shall be referenced as "CSR" with a corresponding numerical citation.

A hearing in this matter was held before Personnel Hearing Officer Joanna Lee Kaye ("hearing officer") on November 18, 2002 at the Career Service Authority Offices. The Agency was represented by Assistant City Attorney Mindy Wright, with POB's Assistant Director, James Williamson, present for the entirety of the proceedings as advisory representative for the Agency. Appellant was present and represented himself.

The Agency called the following witnesses: Mr. Williamson, General Services' Administrative Department Human Resources Specialist, Regina Garcia, and POB Director Dan Barbee.

Appellant testified on his own behalf and did not call additional witnesses.

The parties stipulated to the admission of Agency Exhibit 10,¹ and Appellant's Exhibit A.

¹ Appellant testified he did not object to Exhibit 10 because he recognized the title as being one of the titles he had seen brought into the office on prior occasions. However, it is not clear that Appellant saw this particular magazine, or whether he had previously seen some other magazine(s) of the same title.

Agency Exhibits 2, 3, 4, 12, 13, and 14 were admitted without objection. Exhibits 5 thru 11, exclusive of 10, were admitted over Appellant's objection that he had never seen them before.

Exhibit B was admitted over the Agency's objection that it was not produced during the relevant timeframes, and that Appellant had not provided a copy to the Agency before the hearing.

No additional exhibits were offered or admitted.

PRELIMINARY MATTERS

1. The Hearing Officer's Jurisdiction

The hearing officer finds she has jurisdiction to hear this case as a suspension pursuant to CSR Rule 19-10 b), as follows in relevant part:

Section 19-10 Actions Subject to Appeal

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.

- ...b) Actions of appointing authority: Any action of an appointing authority resulting in... suspension... which results in an alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

Jurisdiction over Appellant's suspension was not disputed by either party to this case.

2. Burden of proof

The City Charter, C5.25(4) and CSR 2-104(b)(4) require the hearing officer to determine the facts of the case "*de novo*." This means that she is mandated to make independent determinations of the facts and resolution of factual disputes. Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975.)

In civil administrative proceedings such as this one, the level of proof required for a party to prove its case is a *preponderance of the evidence*. See, 13-25-127, C.R.S (2001). In other words, to be meritorious, the party bearing the burden must demonstrate that the assertions it makes in support of its claims are more likely true than not.

It has previously been established that the Agency responsible for disciplining a Career Service employee affirmatively bears the initial burden of establishing, by a preponderance of the evidence, that it had *just cause* for the disciplinary action. See, In the Matter of the Appeal of

Vernon Brunzetti, Appeal No. 160-00 (Hearing Officer Bruce A. Plotkin, 12/8/00). The severity of discipline must also be reasonably related to the nature of the offense in question. *See, In the Matter of Leamon Taplan*, Appeal No. 35-99 (Hearing Officer Michael L. Bieda, 11/22/99).

ISSUES

1. Whether the Agency has shown by a preponderance of the evidence that Appellant engaged in the alleged acts.
2. If so, whether the acts constitute violations of CSR rules, giving the Agency just cause to discipline Appellant.
3. If so, whether Appellant's one-week suspension without pay is reasonably related to the seriousness of the offenses in question.

FINDINGS OF FACT

1. Appellant has been a Utility Worker for the POB for an uncertain number of years. It is apparent that he is a veteran employee of the POB. As a veteran employee, Appellant is aware that youth are typically present and work on the premises during the Agency's summer youth program.
2. The POB has a shop for its utility workers in the basement of the City and County Building (hereafter "Room 28"). Room 28 includes an office area with a desk for the supervisor nearest to the door, and another desk next to it for the supervisor's assistant. The supervisor's desk is typically kept locked, but the assistant's desk is not. Room 28 also contains a number of locked storage and tool cabinets, and lockers for the employees. The supervisor, or acting supervisor, is responsible for the keys for the various locking cabinets. It is not clear from the evidence how often the supervisors access the various locking cabinets, or for what purposes they would do so.
3. Appellant was present for sexual harassment training conducted by the Agency's Human Resources Specialist, Regina Garcia, on May 27, 1998 (*see*, Exhibits 13 and 14).² The Agency's sexual harassment policy includes a prohibition against any sexually explicit materials. However, the main thrust of both the sexual harassment policy and the training (*see*, Exhibit 12) is conduct resulting in offense to employees, and the reporting procedures for reporting such offensive conduct. The policy includes reporting procedures for both employees and supervisors. While the reporting procedures for employees apparently focus on reporting unwelcome actions taken against them, supervisors are under a special duty to take affirmative actions to "assure that pornographic or offensive materials... are eradicated from the work place..." (*See*, Exhibit 13, paragraph 5).

² While Appellant was Acting Supervisor at the times relevant to this case, he was not at the time he received this training.

4. POB supervisors are responsible for managing the workload, and for assuring that their employees perform their duties and comply with governing regulations. Acting supervisors have the same responsibilities as regular supervisors.
5. During a period of several years before the incidents giving rise to this appeal, the Utility Worker Supervisor was James Logan. For about a year prior to the events in this case, Mr. Logan and another utility worker, Eric Ortega, engaged in a monthly ritual in which one or both of them would bring a sexually suggestive magazine into the office and refer to it as the "magazine of the month." Appellant knew about this activity, but did not participate in it and believed it was inappropriate. He was aware of the types of magazines that were brought in, and knew of at least two of the titles; one being "Maxim" (which he recognized as Exhibit 10 during the hearing) and another, the title of which was three initials such as "FML"³ the title he recalled during the predisciplinary meeting (*see*, Exhibit 4).
6. The magazines at issue are sexually suggestive and appear to be directed primarily to men (*see*, Exhibits 5 through 11). They are not visually as explicit as magazines such as Playboy, Penthouse and magazines of that caliber, but contain dozens of photographs of scantily-clad women in suggestive poses. The primary focus of the magazines is clearly sex. They contain articles largely concerning a broad variety of sexually explicit topics such as bestiality, loss of virginity, fetishism, improvement of one's sexual techniques, and the like. It is undisputed that the magazines are clearly inappropriate for availability on City property.
7. Appellant does not recall seeing the magazines anywhere in Room 28 at any time except during the monthly ritual during which Mr. Ortega would bring one in, and Mr. Logan and Mr. Ortega would talk about the "magazine of the month." Appellant testified he presumed Mr. Ortega or Mr. Logan might have put the magazine in one of their lockers each time they were done with the monthly ritual, or perhaps taken it back home, but either way he did not know the fate of the magazines after the "magazine of the month" ritual because he distanced himself from this activity. Appellant never saw the magazines in plain view on top of any tables or cabinets, or anywhere else in Room 28.
8. There is no evidence that the magazines in question have ever been seen in plain view in Room 28 other than during the "magazine of the month" ritual, nor has there been any suggestion to this effect. There is no evidence tending to suggest that any female employees were aware of the magazines or the magazine ritual. There is no evidence tending to suggest that any youth volunteers had any access whatsoever to the storage cabinets in Room 28, or were previously aware of the magazines or the magazine ritual, or that any such magazines had ever been seen by or given to youth volunteers on any occasion prior to this case. It is undisputed that the magazine activity was never complained of or reported by any of the utility workers or their supervisors until the time of the incidents leading to this appeal.
9. In approximately the spring of 2001, Mr. Logan began having long periods of absenteeism for various reasons. Mr. Logan had appointed Vincent Torres as his "assistant supervisor"

³ Apparently, the correct title of this magazine is "FHM" which reportedly stands for "For Him Magazine." (*See*, Exhibit 7.)

and Mr. Torres apparently covered for Mr. Logan during some of his absences, but Mr. Torres was eventually removed from this position because he too had attendance problems. It is not clear when this happened. While Ms. Garcia testified that Appellant was "responsible" as "acting supervisor" "on and off" during Mr. Logan's absences, the times and lengths of those occasions are not in evidence with the exception of the month of May, 2002.

10. Mr. Logan was absent for the first two weeks in April of 2002, apparently on investigatory leave. Vincent Torres was Acting Supervisor during this time. Mr. Logan then returned and worked for two weeks during the last part of April, 2002.
11. On or around May 4, 2002, Mr. Logan was placed on a thirty-day suspension. Appellant was appointed as Acting Supervisor at that time. The Agency's Custodial Services Contract Administrator, Georgio D. Ra'Shadd, became Appellant's direct supervisor upon this appointment. Appellant served in this capacity for the entire month of May. On June 4, 2002, after thirty days in his appointment as Acting Supervisor, Appellant's pay was adjusted to reflect his acting supervisory status pursuant to CSR 7-80.⁴
12. When Appellant was formally appointed as Acting Supervisor, he had an orientation meeting with the staff during which he introduced himself as the new Acting Supervisor, and stated his expectations of the staff at that time. Appellant did not mention the magazines during this orientation meeting, and testified the magazines did not come to his mind during this meeting.
13. Mr. Ortega remained a utility worker during Mr. Logan's various absences, including after Appellant was appointed Acting Supervisor. Appellant does not recall Mr. Ortega or anyone bringing in objectionable magazines during Mr. Logan's absences, including while Appellant was Acting Supervisor, and did not see any such magazines on the premises during his appointment as Acting Supervisor.
14. On approximately July 3 or 4, 2002 Appellant injured his back while lifting a buffer to take to a City facility. He filed a worker's compensation claim.
15. Appellant was scheduled to be on vacation from July 5 through 15, 2002 (Exhibit A). The vacation was pre-arranged and coincidentally began just after Appellant injured his back.
16. Before Appellant left for his vacation, he met with Mr. Ra'Shadd, night-shift Custodial Supervisor Steve Pacheco, and Custodial Supervisor Rick Castaneda. During this meeting, it was informally agreed that Mr. Castaneda would cover Appellant's supervisory duties and be in charge of the keys during Mr. Stockton's absence. Appellant turned the keys to the cabinets over to Mr. Castaneda after this meeting before he went on vacation. Appellant testified that whenever the shop supervisor went on leave in the past, typically another individual was informally appointed to cover for him in his absence.

⁴ Mr. Logan never returned to his position and was terminated apparently around this time.

17. On July 12, 2002 Mr. Ra'Shadd sent Ms. Garcia an e-mail in which he informed her that Appellant had filed a worker's compensation claim, and as a result, was being placed on restrictive duty for a period of three weeks. The e-mail further requests that Appellant be placed on the night shift as a modified-duty assignment, and that Mr. Castaneda be placed in the acting supervisor position. Finally, the e-mail states that Appellant's supervisor on the night shift would be Steve Pacheco, who could train Appellant because he was a "pro."
18. POB Assistant Director, James Williamson, testified that Mr. Ra'Shadd reported to him as follows. On July 15, 2002 Mr. Ra'Shadd had been walking past Room 28 and saw one of the youth volunteers looking at a risqué magazine. The youth was a male, reportedly 16 years old.
19. Mr. Barbee testified it was "reported" to him that the magazines in Exhibits 5 through 11 were found after the youth was observed looking at one of the magazines. While the magazines were alleged to have been found "in a cabinet" "in the break room" in Room 28 (*see*, Exhibit 2) the person who found them is unknown and did not testify. It is not clear who told Mr. Barbee the magazines were found "in a cabinet." The evidence does not establish which "cabinet," whether the location was in plain view or secure, whether the cabinet was locked unlocked (and if so who unlocked it), or whether the cabinet was left standing open. Finally, there is no evidence tending to suggest one way or the other whether the alleged cabinet was regularly accessed by Appellant, and therefore, whether Appellant more likely than not should have known the magazines were on the premises before he went on vacation.
20. While the Agency's disciplinary letters (Exhibits 2 and 3) suggest that the magazines were given to the youth by Mr. Ortega and another utility worker, Geronimo Vasquez, the Agency provided no evidence tending to establish how the Agency learned of this, who knew where to find the magazines, who retrieved them and gave them to the youth, or whether the youth found them on his own, and if so, how. Mr. Ra'Shadd did not testify.
21. Coincidentally during the late morning of July 15, 2002, Appellant went into the office to meet with Mr. Ra'Shadd concerning his return to work on modified-duty status the following day. He was waiting outside Mr. Ra'Shadd's office when Mr. Ra'Shadd walked by and went into his office with Mr. Castaneda and several other people. After a few minutes, Mr. Castaneda came out and got Appellant. They returned to Mr. Ra'Shadd's office, where Mr. Ra'Shadd presented the risqué magazines to Appellant and told him the youth had been looking at them.
22. Mr. Williamson testified that Mr. Ra'Shadd then brought the youth and the magazines (Exhibits 5 through 11) to Mr. Williamson's office to report the incident. Mr. Williamson then conducted an investigation in order to ascertain what had happened.
23. Mr. Williamson testified that the basis for the unacceptability of the magazines in Exhibits 5 through 11 is the Agency's sexual harassment policy (*see*, Exhibit 13, paragraph 5).
24. Meanwhile, on July 16, 2002 Ms. Garcia responded to Mr. Ra'Shadd's July 12 e-mail approving the replacement of Appellant with Mr. Castaneda as Acting Supervisor to

accommodate Appellant's needs for modified duty. Ms. Garcia's e-mail also suggests issuing Mr. Castaneda a "letter" as soon as possible that he was being placed in the acting supervisory assignment.

25. Mr. Barbee and Mr. Williamson both testified that they consider the assigned supervisor accountable for his or her staff even while the supervisor is on vacation. Ms. Garcia testified that she presumed another employee would be assigned to cover supervisory duties while a supervisor is absent from the office on vacation.
26. Mr. Williamson did not know Mr. Ra'Shadd had informally assigned Mr. Castaneda to cover for Appellant's supervisory duties before Appellant left for vacation. Mr. Castaneda was not formally appointed as Acting Supervisor until after Appellant's return from vacation, when he was placed on the night shift for his modified-duty status.
27. The Agency prepared a Contemplation of Disciplinary Action letter and sent it to Appellant on August 1, 2002 (Exhibit 2). The Contemplation letter set a predisciplinary meeting for August 14, 2002.
28. Present at the predisciplinary meeting on August 14, 2002 were Ms. Garcia, Mr. Barbee, Mr. Williamson, Custodial Services Supervisor Tony Ruiz, and Appellant. During the meeting, Appellant admitted knowing about the magazine ritual, and that the magazines had been on the premises in the past before Appellant was appointed Acting Supervisor. Appellant also stated he concurred it would be inappropriate for minors to be in possession of the magazines of which he was aware. Appellant noted he had been in several training classes during the past few months, including sexual harassment and employment law, in addition to several other subjects. He told the meeting participants that none of his female employees ever complained of harassment or reported as much to him. (See, Exhibit 4.)
29. Mr. Williamson and Mr. Barbee testified that following the predisciplinary meeting, they elected to suspend Appellant for one week. Mr. Williamson testified that his recommendation of a five-day suspension was based on the fact that as the Acting Supervisor, Appellant was responsible for what occurred in his shop, even during his absence while on vacation. Mr. Barbee testified that his determination to suspend Appellant for five days was based on the fact that Appellant was Acting Supervisor, that he had knowledge of the magazine activity, and that he allowed it to continue after being appointed Acting Supervisor without taking any prophylactic action.
30. On August 28, 2002 the Agency prepared and sent Appellant a "Notice of Suspension" (Exhibit 3). This letter informed Appellant that the Agency had determined to issue him a five-day suspension without pay from September 2 through 6, 2002.
31. Appellant timely filed an appeal of his suspension on September 4, 2002.

DISCUSSION

1. Rules the Agency alleges Appellant violated.

The Agency posits that Appellant's conduct constitutes violations of the following CSR rules (*see*, Exhibit 3):

Section 16-50 Discipline and Termination

A. Causes for Dismissal:

The following may be cause for dismissal of a career service employee. A lesser discipline other than dismissal may be imposed where circumstances warrant. It is impossible to identify within this rule all conduct which may be cause for discipline. Therefore, this is not an exclusive list.

- 1) Gross negligence or willful neglect of duty.
- ...17) Conduct which violates the Charter of the City and County of Denver or the Revised Municipal Code of the City and County of Denver (specifically Revised Municipal Code 34-46 A, set forth below).
- ...20) Conduct not specifically identified herein may also be cause for dismissal.

* * *

Section 16-51 Causes for Progressive Discipline

A. The following unacceptable behavior or performance may be cause for progressive discipline....

- ...6) Carelessness in performance of duties and responsibilities.
- ...11) Conduct not specifically identified herein may also be cause for progressive discipline.

* * *

The Revised Municipal Code reads as follows in relevant part:

Section 34-46: Other wrongs to minors.

- (a) It shall be unlawful for any person knowingly, intentionally or negligently and without justifiable excuse, to cause:

- ... (4) The endangerment or impairment of the morals of any minor.

* * *

The Agency further alleged that Appellant's actions constitute violations of the following portions of CSR Rule 15, CODE OF CONDUCT:

Section 15-10 Employee Conduct

Every employee of the City and County of Denver shall conscientiously fulfill the duties and responsibilities of his or her position. The conduct of every employee during work hours or at any time while representing the agency, department, or City shall reflect credit upon the Career Service and the City and County of Denver.

* * *

Section 15-100 Harassment and/or Discrimination

15-101 Policy

It is the policy of the Career Service Board that all employees have a right to work in an environment free of discrimination and unlawful harassment. The City maintains a strict policy prohibiting discrimination, sexual harassment and harassment because of...gender...All such harassment or discrimination is unlawful. Unlawful harassment in any form, including verbal, physical, and visual conduct, threats, demands, and retaliation is prohibited.

* * *

2. Analysis of the evidence.

a. Appellant's responsibility as acting supervisor while on vacation.

Appellant argues that other supervisors knew about the magazines before he was ever appointed as Acting Supervisor. He further asserts he was on vacation when the magazines were discovered, at which time another employee was acting as supervisor. Appellant alleges that therefore he cannot be held responsible for their discovery on work premises during his absence, when someone else was covering for him.

The fact that others should also be held responsible for the presence of the magazines is not dispositive of Appellant's responsibility. The fact that Mr. Castaneda was covering Appellant's supervisory functions, whether formally or informally, does not shift any of Appellant's responsibilities prior to leaving for vacation to Mr. Castaneda, any more than Appellant's formal appointment as Acting Supervisor absolves Mr. Logan of his responsibilities to have prevented the activity in question.

The hearing officer concludes that who else should have reported them is not relevant to what Appellant's responsibilities were upon his appointment as Acting Supervisor. The question is not who was on guard when the magazines were found, but whether Appellant had a reasonable

opportunity prior to their discovery to eliminate them, despite the actions or inactions of others. However, as discussed below, the hearing officer also finds that there are other circumstances that mitigate Appellant's failure to do so.

b. Allegation of violation of "carelessness in performance of duties and responsibilities" in violation of CSR 16-51 A. 6).

The Agency alleges that Appellant knew the magazines were being kept on the premises at the time they were found by and/or delivered to the youth. The disciplinary letter (Exhibit 3, p. 3) specifically alleges that Appellant "knew that (Mr. Ortega) was storing obscene magazines in a cabinet in the break area." The hearing officer has reviewed the record thoroughly and can find no evidence tending to establish that this hearsay assertion is true. On the contrary, every instance in the record in which Appellant admitted to having knowledge of the magazine activity, appears to be referring to Appellant's knowledge that this activity had been going on in the past.

Although the rules excluding hearsay evidence are relaxed in administrative proceedings, "such relaxation must not be extended so as to disregard due process of law and fundamental rights." 117th Association v. Board of Equalization, 811 P.2d 461 (Colo. App. 1991); *citing* Puncec v. City & County of Denver, 28 Colo. App. 542, 475 P.2d 359 (1970). Allegations cannot be proved by a preponderance of the evidence where uncorroborated hearsay is the sole basis for the fact in issue. Allen v. Industrial Comm., 36 P.2d 330 (Colo. App. 1975). Thus, while perhaps Appellant can reasonably be expected to suspect there might still be magazines on the premises someplace, the evidence does not establish that Appellant knew this was the case.

The Agency argues that Appellant should have taken affirmative steps upon his appointment as Acting Supervisor to eliminate any and all inappropriate magazines and related activity. Appellant responds that the issue of the magazines did not come to his mind during his orientation meeting. The hearing officer finds this assertion credible. It is important to keep in mind that this activity was not constant. Once again, by all reports it happened once a month. Appellant testified that the times he saw the magazines were during that ritual. He did not know the fate of the magazines after the monthly ritual. He did not know whether the magazines remained on the premises thereafter, whether the men took them home, or locked them in their lockers, or what else might have happened to them. By Appellant's own credible testimony he did not condone this ritual, he distanced himself from it, and therefore he knew very little about it. There is no evidence that anyone else ever saw these magazines out in plain view at any time other than the monthly magazine ritual either. Furthermore, Appellant asserts he did not observe the magazines being stored anywhere in the premises at any time.

In addition, it is significant that the reason Appellant was appointed Acting Supervisor was because Mr. Logan, one of the two primary participants in the magazine ritual, left and never came back. Appellant did not observe magazine activity when Mr. Logan was absent, and Mr. Logan had been terminated by the time of his appointment. Not having seen any magazine activity in Mr. Logan's absence, the issue, as Appellant credibly testified, was clearly not forefront in Appellant's mind upon Mr. Logan's departure when he held his introductory staff meeting.

For the foregoing reasons, while the Agency has proven that Appellant knew of times in the past when the magazines were on the premises, it has not demonstrated that Appellant more likely than not knew the magazines were still on the premises after his appointment as Acting Supervisor.

In light of Appellant's ignorance about the lingering presence of the magazines on City property after his appointment as Acting Supervisor, the true nature of his responsibility can be demonstrated by the only possible alternative action Appellant might have taken: the *presumption* by Appellant, upon his appointment as Acting Supervisor, that the magazines might still be lurking around somewhere, and the announcement that if this were the case, it must be immediately rectified and would no longer be tolerated. The hearing officer concurs that, in light of Appellant's knowledge of prior ongoing inappropriate activity, he should have erred on the side of caution by taking this preventative action.

Therefore, the hearing officer concludes that Appellant's only factual offense was his oversight in failing to make sure the staff knew he would not tolerate the magazines, despite his knowledge that there had been a history of such activity. This offense having been shown, the Agency has demonstrated that Appellant violated CSR 16-51 A. 6), prohibiting carelessness in the performance of duties and responsibilities.

c. Allegations of violation of sexual harassment policy.

While the Agency primarily bases its charges against Appellant on the presumption that the magazines were in violation of the sexual harassment policy (Exhibit 13), the Agency failed to cite this policy in the predisciplinary letter, and there is no indication that a copy of the policy was attached to the letter. Therefore, Appellant apparently was not notified of the Agency's allegation of this violation before the predisciplinary meeting. Appellant was therefore not provided with notice or the opportunity to respond to this alleged violation during the predisciplinary process, and it is not ripe for appeal. *See, Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

However, even if the Agency had notified Appellant of this alleged rule violation, the evidence does not clearly show that any such violation occurred as a result of Appellant's actions. The primary focus of the Agency's policy, as well as the federal statutes and case law establishing what constitutes "sexual harassment," clearly rests on the presumption that other employees have been offended by the objectionable conduct to the extent that it interferes with their employment.

"Sexual harassment" and "hostile work environment" are legal terms of art used to refer to extreme, ongoing patterns of hostile discrimination against an individual in the workplace because of his or her status as a member of a protected class. Such cases are distinguished by graphic, overtly racist or sexist patterns of verbal or physical abuse, causing the employee notable interruption in his ability to live and/or work. "... (H)arassment is actionable under a hostile work environment theory when the harassing conduct is 'sufficiently severe or pervasive to alter the conditions [of the victim's] employment and create an abusive working environment.'" *Pizza Hut v. Lockard*, 162 F.3d 1062, 1071, quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). Some factors to be weighed include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work

performance." Id. at 23. Smith v. N.W. Fin. Acceptance Corp., 129 F.3d 1408, 1413 (conduct must be "sufficiently pervasive *or* sufficiently severe"). The harassing conduct must be "both objectively and subjectively abusive." Lockard, 162 F.3d at 1071.

Similarly, the definition set forth in the department's own regulation (Exhibit 13) suggests that the conduct must be found offensive to a party before it is considered "harassment:"

DEFINITION:

1. Unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature constitutes sexual harassment if:
 - a) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
 - b) submission to, or the rejection of, such conduct by an individual is used as the basis for employment decisions affecting such individual, or
 - c) 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.

Thus, while the Agency's arguments clearly illustrate that it does not interpret its own policy on harassment and discrimination (Exhibit 13) to require publication to an offended party, such a presumption is not consistent with the regulation's own language.

As Appellant pointed out, there have never been any complaints filed by anyone concerning the magazine ritual. There is no evidence that the magazines were ever shown to or seen by anyone (except perhaps Appellant himself) who found them offensive. In short, the evidence in this case does not show that the magazine activity constitutes "sexual harassment" in violation of the regulation under the above definition.

This is not to suggest that the Agency does not have the right to control inappropriate conduct, such as the possession of explicit magazines in the workplace, and the exposure of youth to those magazines. But the fact that the commonly accepted use of the term "harassment" in employment law does not include mere possession of offensive materials, tends to suggest a presumption against the Agency's interpretation to the contrary, particularly where the rest of the policy's language is so similar to standing statutes and precedent. If the Agency wishes to include the mere presence of offensive materials in its "sexual harassment" policy, that policy must clearly state that the publication to individuals who take offense is not required to be in violation of the policy.

Under the department regulation as it is currently worded, it has not been shown the Appellant engaged in any act constituting "sexual harassment" as it is defined in the Agency's policy. The hearing officer concludes that, under the circumstances of this case, Appellant's inaction does not constitute a violation of paragraph 5 of the Agency's regulation (Exhibit 13). For

all these reasons, all reliance upon this regulation in support of the Agency's case has been disregarded.

d. Allegations of violation of CSR 15-101.

For similar reasons, the Agency has failed to show a violation of CSR 15-101. First of all, the subsection cited by the Agency is a policy declaration. As is the case with many policy declarations, this subsection in itself does not establish any remedy. The methods for seeking a remedy under the policy are set forth in the subsequent subsections.

Second, it is well established that a claim under CSR 15-100, *et seq.* is not yet ripe for the hearing officer's review unless and until the remedies it sets forth have already been exhausted. See, In the Matter of Grant Chappell, Appeal No. 02-02 (Dismissal entered March 22, 2002).

Furthermore, the entire procedure set forth in that rule again presumes that a party has been offended, and in fact exists to provide a remedy for that offense. CSR Rule 15-103 requires the employee to:

- A. make it clear that such behavior is offensive to them and request that such behavior be discontinued, *and*
- B. report such conduct to their supervisor... If the complaint involves an employee's supervisor... the employee may go to another supervisor, to his or her agency human resource representative or directly to the Career Service Authority Employee Relations Section.

(Emphasis added.) Thus, there must first be a *report by the offended party* of the offensive conduct in question. Under CSR Rule 15-104, the agency or the Career Service Authority is then mandated to:

...immediately undertake effective, thorough, and objective steps concerning the allegation of harassment or discrimination. If an investigation is deemed necessary, it will be completed and a determination regarding alleged harassment will be made and communicated to the employees as soon as practicable...

Upon such determination the Agency is then required, under CSR Rule 15-105, to take remedial action:

If it is determined that unlawful harassment or discrimination has occurred, the agency will take effective remedial action commensurate with the severity of the offense. Appropriate action will be taken to deter any future harassment.

Finally, CSR Rule 19-10 f) makes clear not only that the Hearings Office does not have jurisdiction over such a case until the process described above is completed, but also that the party with standing to seek an appeal is the offended employee:

- f) Harassment and Discrimination: The *disposition* by a supervisor or other appropriate official *of a complaint of harassment or discrimination may be appealed* if such disposition has not resulted in stopping the prohibited behavior.

(Emphasis added.)

None of these procedures has been exhausted here. In addition, CSR 15-100, *et seq.* is not relevant in this case, where no harassment has been alleged by anybody. For these reasons, the Agency's charge that Appellant's actions violated CSR 15-101 must be dismissed.

e. Allegations of violations of CSR 15-10.

CSR 15-10 again appears to be a policy statement including vague terminology generally intended to describe optimally preferred behavior by Career Service employees. The enforceability of this policy declaration is found in the body of the subsequent specific regulations under CSR Rule 15. It is those specific regulations that establish which types of conduct are prohibited. CSR 15-10 does not in itself provide the basis for discipline. This allegation must therefore be dismissed.

f. Allegation of violation of Municipal Code Section 34-46: Other wrongs to minors.

Appellant argues that his role in the circumstances leading to the youth coming into possession of the magazine is too tenuous to hold him responsible for a violation of this section of the Municipal Code. For the following reasons, the hearing officer agrees.

First, as set forth above, Appellant did not know the magazines were still on the premises. Since Appellant himself did not see any evidence of the magazines, he therefore did not foresee that anyone else would find them lying around, or otherwise gain access to them.

In addition, the disciplinary letter (Exhibit 3) suggests that the magazine was given to the youth by Mr. Ortega and Mr. Vasquez.⁵ Even assuming the Agency's own allegations for the sake of argument, the youth did not find the magazine lying around. Rather, it was Mr. Ortega and Mr. Vasquez who gave the magazine to the youth. Assuming this is true, nothing in the evidence tends to show that Appellant had reason to anticipate such an occurrence.

Finally, the Agency argues that it is not significant that Appellant was on vacation when this happened. While this argument might not be relevant to whether Appellant completely fulfilled his supervisory duties in warning his employees that the magazine activity was to cease, the hearing officer is not persuaded that his absence is irrelevant when it comes to his alleged contribution to the delinquency of a minor. If Mr. Ortega is the kind of individual who would show such magazines to the youth, then it is not persuasive that Appellant telling him to get rid of them and/or stop bringing them in would have prevented Mr. Ortega from doing so while Appellant was on vacation.

⁵ This is a hearsay assertion. The Agency has failed to show how the magazine ended up in the youth's hands, who if anyone gave it to him or whether he found it himself. The evidence does not establish who found the rest of the magazines, or where they found. In fact, it is entirely unclear from the evidence where these magazines came from, other than from the vague, second-hand report that they were found "in a cabinet."

Therefore, even assuming that Appellant had told his staff to stop the magazine activities, this is likely no guarantee Mr. Ortega would not have surreptitiously continued to bring them in while the supervisor was on vacation. This is not to excuse Appellant's careless failure to affirmatively address this issue. It is merely to underscore that Appellant did not have full control over the unlikely, unforeseeable actions of a wayward employee in his absence. "One person's [wrongful conduct] is not the proximate or direct cause of an injury where there is a new, separate, wholly independent...intervening cause of the injury." Finkbiner v. Clay County, 714 P.2d 1380, 1384 (1998). The Agency has not shown that without Ortega's and Vasquez' intervening act, the youth would likely have come into possession of the magazine. See, Major v. Castlegate, Inc., 935 P.2d 225, 230 (Kan. App. 1997).

The hearing officer concludes that the Agency has not shown Appellant's actions were the proximate cause of the magazine ending up in the youth's hands. Rather, by the Agency's own assertion, this event was caused by the unforeseen, intervening act of Mr. Ortega and Mr. Vasquez. The charge of a violation of Revised Municipal Code Section 34-46 must therefore be dismissed.

g. Allegation of "gross negligence or willful neglect of duties" in violation of CSR 16-50 A. 1).

The Agency argues that Appellant's conduct constitutes "gross negligence or willful neglect of duties" in violation of CSR 16-50 A. 1). For the same reasons she has found many mitigating circumstances in the discussion above, the hearing officer finds Appellant's actions do not justify a finding of "gross negligence" or "willful neglect of duties."

"Gross negligence" and "willful neglect" are not defined anywhere in the CSR rules. The hearing officer must therefore look elsewhere for guidance.

"Negligence" does not require intent. It is commonly defined as the failure to use reasonable care or failure to act in a reasonably prudent manner under the circumstances. Lavine v. Clear Creek Skiing Corp., 557 F.2d 730 (10th Cir. 1977); Metropolitan Gas Repair Service, Inc. v. Kulik, 621 P.2d 313 (Colo. 1980).

"Gross negligence" suggests a higher level of culpability than mere negligence. Use of the term in this context means flagrant or beyond all allowance, Lee v. State Board of Dental Examiners, 654 P.2d 839 (Colo. 1982), or showing an *utter* lack of responsibility. People V. Blewitt, 192 Colo. 438, 563 P.2d 1 (1977) (emphasis added). Black's Law Dictionary, 5th Edition (1979) defines "gross negligence" as:

The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting a legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care... Ordinary and gross negligence differ in degree of inattention, while both differ in kind from willful and intentional wrong...

“Willful neglect,” on the other hand, implies that the wrongful conduct is intentional or conscious. Black’s defines it as follows:

The intentional disregard of a plain or manifest duty... Willful neglect suggests intentional, conscious, or known negligence – a knowing or intentional mistake. Puget Sound Painters v. State, 45 Wash.2d 819, 278 P.2d 302, 303.

As set forth above, the Agency has not shown that Appellant knew the magazines were still on work premises. Thus, while Appellant, as a supervisor, should have exercised common sense and taken steps to assure that the material had been eliminated from the workplace, the hearing officer does not conclude that Appellant’s oversight can be characterized as “flagrant beyond all allowance” or showing an “utter lack of responsibility.” Nor can Appellant’s inaction be characterized as an intentional, conscious or knowing violation.

Appellant’s inaction therefore does not rise to the extreme level necessary to constitute “gross negligence” or “willful neglect of duty” as set forth above. The charge of a violation of CSR 16-50 A. 1) must therefore be dismissed.

3. Severity of the discipline.

CSR Rule 16, governing disciplinary actions, states as follows in relevant part:

16-10 Purpose

The purpose of discipline is to correct inappropriate behavior or performance. The type and severity of discipline depends on the gravity of the infraction. The degree of discipline shall be *reasonably related* to the seriousness of the offense, and shall take into consideration the employee’s past record. The appointing authority or designee shall impose the type and amount of discipline she/he believes is needed to correct the situation and achieve the desired behavior or performance...

(Emphasis added.)

Section 16-20 Progressive Discipline

... 2) Wherever practicable, discipline shall be progressive. However, any measure or level of discipline may be used in any given situation as appropriate. This rule should not be interpreted to mean that progressive discipline must be taken...

(Emphasis added.)⁶

⁶ The disciplinary letter indicates Appellant has received four written reprimands in the past, on May 14, 1997, September 25, 1997, November 26, 1997, and October 11, 2000, all for failure to comply with the instructions of a supervisor. Those written reprimands are not in evidence and the factual basis for them is unknown. The Agency officials did not reference these prior disciplinary actions in their testimony concerning the severity of discipline in this case and they apparently did not assign much weight to those prior actions. The prior actions have therefore been disregarded.

Thus, in determining the appropriateness of a given disciplinary action, the test is whether the degree of discipline is "reasonably related" to the seriousness of the present offense. *See, Leamon Taplan, above.* It is a well-established principle of employment law that in determining whether the discipline is reasonably related, it must be "within the range of reasonable alternatives available to a reasonable, prudent agency administrator." *See, In the Matter of William Armbruster*, Appeal No. 377-01 (decision entered 3/22/02), *citing Adkins v. Div. of Youth Services*, 720 P.2d 626 (Colo. App. 1986). In determining whether the discipline is within the range of reasonable alternatives, the hearing officer will not disturb the Agency's determination of the severity of the discipline, unless it is clearly excessive or based substantially on considerations that are not supported by a preponderance of the evidence. *See, e.g., Armbruster, above; In the Matter of the Appeal of Dolores Gallegos*, Appeal No. 27-01 (entered 3/21/01). The determination of whether the record substantially supports the Agency's determination of the severity of discipline must be made on a case-by-case basis, based on the particular circumstances.

The hearing officer has dismissed or disregarded the most serious rule violations the Agency has alleged against Appellant, including "gross negligence," "harassment and discrimination" in violation of CSR Rule 15 and the Agency's own regulation, and negligently contributing to the delinquency of a minor under the Revised Municipal Code.

However, the conclusion that the Agency might not have chosen the most appropriate alleged violations is distinct from whether the facts themselves have substantially been shown, and whether those facts justify the chosen discipline. In addition, the nature of the alleged rule violations aside, Appellant concurs with the Agency that as a practical matter, the magazines are clearly unsuitable for presence on Agency premises.

The Agency officials apparently took Appellant's concession during the predisciplinary meeting, that he knew about the magazine activity, to mean that Appellant was aware of such activity during his assignment as Acting Supervisor. The Agency specifically alleged that Appellant knew the magazines were being stored in a cabinet on the premises. The evidence does not establish by a preponderance that this was the case. However, with this one exception, the record establishes that the Agency was substantially in possession of the facts as they have been shown in the record when it concluded that a one-week suspension was justified. The facts the Agency considered are that the magazines were found on the premises after Appellant had been appointed Acting Supervisor, and that he failed to clearly prohibit such activity, despite his knowledge of prior, ongoing misconduct of this sort. The Agency has further pointed out that as a supervisor, Appellant must be held to a higher standard.

The hearing officer concludes that while there is a discrepancy in the Agency's factual allegations, based on the Agency's reasoning for its determination to suspend Appellant, the factual discrepancy is not substantial enough to warrant the hearing officer's intervention into the Agency's determination of the severity of the discipline. In light of Appellant's supervisory status, the severity of discipline is not clearly excessive and is within the range of reasonable alternatives available to a reasonable, prudent administrator.

CONCLUSIONS OF LAW

1. The Agency has demonstrated by a preponderance of evidence that upon Appellant's appointment as acting supervisor, he negligently failed to announce to his staff that he would not tolerate the presence of sexually oriented, objectionable magazines on the premises, of which he had been aware prior to his appointment as Acting Supervisor. Appellant's negligent failure to do so constitutes carelessness in the performance of duties and responsibilities in violation of CSR 16-51 A. 6).
2. The Agency has failed to demonstrate by a preponderance of the evidence that Appellant engaged in:
 - a) Gross negligence or willful neglect of duty in violation of CSR 16-50 A. 7);
 - b) Violation of the Agency departmental regulation prohibiting harassment and discrimination (Exhibit 13);
 - c) Discrimination or harassment in violation of CSR 15-101;
 - d) CSR 15-10, policy statement on employee conduct;
 - e) Negligent contribution to the delinquency of a minor in violation of Revised Municipal Code Section 34-46.
3. The Agency has demonstrated just cause for disciplining Appellant by a preponderance of the evidence.
4. In light of the totality of evidence in this case, although the hearing officer has concluded that many of the rule violations alleged by the Agency are not supported by the record, the Agency's decision to issue Appellant a one-week suspension was based on factual allegations that were substantially supported by a preponderance of the evidence. The hearing officer concludes that the Agency's arguments concerning the severity of the discipline are entitled to deference and shall not be disturbed on review. Based on Appellant's supervisory status, his prior knowledge of ongoing inappropriate conduct, and his failure to address the misconduct upon his supervisory appointment, the chosen discipline was within the range of reasonable alternatives available to the Agency.

DECISION AND ORDER

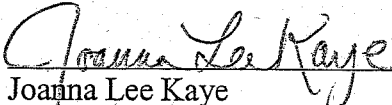
Based on the Findings and Conclusions set forth above, the Agency's decision to issue discipline Appellant shall be AFFIRMED and MODIFIED as follows:

The letter documenting the one-week suspension should be removed from all files and replaced with a suspension letter in which the following modifications have been made:

- a) Reference to the day of the incident in question should be only to July 15, 2002. Reference to July 16, 2002 should be eliminated.
- b) Any and all allegations that Appellant had any knowledge the magazines were being stored in a cabinet or anywhere else on the premises during his tenure as Acting Supervisor shall be removed.
- c) References to Appellant's alleged violations which the hearing officer has concluded are not supported by the record, as set forth above under paragraph 2 of **Conclusions of Law**, shall be stricken. The suspension letter shall only set forth CSR 16-61 A. 6), prohibiting carelessness in the performance of duties.

This case is hereby DISMISSED.

Dated this 3rd day of December, 2002.


Joanna Lee Kaye
Hearing Officer for the
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** depositing same in the U.S. mail, postage prepaid, this 4th day of December, 2002, addressed to:

Rickey E. Stockton
12325 Albrook Dr. #2504
Denver, CO 80239

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** depositing same in interoffice mail, this 4th day of December, 2002, addressed to:

Mindi L. Wright
Assistant City Attorney

Tom Migaki
Department of General Services

Dan Barbee
Public Office Buildings

Virginia Granado