

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

Appeal No. 65-05

DECISION

IN THE MATTER OF THE APPEAL OF:

ANNETTE WILLIAMS,
Appellant,

vs.

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

The hearing in this appeal was held on October 3, 2005 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and was represented by Teresa Zoltanski, Esq. The Agency was represented by Assistant City Attorney Dianne Briscoe. Elizabeth Flores served as the Agency's advisory witness. Having considered the evidence and arguments of the parties, the following findings of fact, conclusions of law and order are entered herein.

INTRODUCTION

Appellant Annette Williams is an Administrative Support Assistant III for the Department of Human Services for the City and County of Denver (the Agency). Appellant appeals the denial of her grievance of a written reprimand which was imposed on May 13, 2005. The appeal also challenges the written reprimand as harassment and retaliation for her complaint of harassment. The Agency's exhibits 1 – 10 and Appellant's exhibits A – I were admitted.

The written reprimand was imposed based on Appellant's failure to begin a scheduled assignment, client orientation, on time. The Agency claims that Appellant was outside talking on her cell phone at 8:40, despite the fact that the orientation was to begin at 8:30. The Agency charged Appellant with gross negligence, refusal to comply with the orders of a supervisor, failure to meet standards of performance, carelessness, and failure to comply with a supervisor's instructions, in violation of Career Service Rules.

The issues presented herein are as follows:

1) Did the Agency establish that Appellant violated the cited section of the Career Service Rules,

2) If so, was the written reprimand justified under the CSR's progressive discipline system,

3) Did the Agency harass Appellant by means of the discipline, and

4) Was the discipline imposed in order to retaliate against Appellant?

FINDINGS OF FACT

The Agency presented the testimony of Elizabeth Flores, supervisor of the Ongoing Child Care Unit, who is Appellant's supervisor. Ms. Flores testified that Appellant and others in her unit were assigned to conduct weekday orientations for applicants for child care assistance since March 2005.

On May 10th, 2005, at 8:40 a.m., Program Case Manager Supervisor Elizabeth Trujillo came into the unit and asked Ms. Flores who was scheduled to do orientation. Ms. Flores told her it was Appellant. Ms. Trujillo then informed Ms. Flores that Appellant was outside talking on her cell phone. Ms. Flores went outside and saw Appellant walking towards Federal Boulevard while using her cell phone. When Ms. Flores reminded Appellant she had orientation, Appellant replied, "oh", and walked back to the building while talking and laughing on the phone. Appellant retrieved the orientation box with the needed supplies, and went to the orientation room.

At 8:50 a.m., Ms. Flores sent an email to all employees on her group distribution list which stated, "This is a verbal warning . . . You will receive a written reprimand the next time I have to address [the] issues [of] forgetting to do orientation [and use of cell phones] during the work day." [Exh. 2.] Fifteen to twenty minutes later, Ms. Flores reviewed Appellant's personnel file and decided to do a written reprimand based upon the existence of previous discipline, including three written reprimands and a verbal reprimand over the past six months. After receiving advice from the Human Resources Department that a group verbal reprimand via email was not valid, Ms. Flores sent another email to her distribution list that day or the next which rescinded the verbal reprimand. All witnesses agreed that they never received the second email. The written reprimand was issued on May 13th after Ms. Flores consulted with Human Resources and the City Attorney's Office. [Exh. 3.] Ms. Flores testified she did not know that Appellant complained about Operations Section Manager Chris Pacetti's behavior until a week or two thereafter.

Ms. Flores testified Appellant knew the start time for orientation was 8:30 a.m. Appellant had been in attendance at unit meetings when this was discussed, and she had been on time for five orientation assignments during the previous two months, as well as her assigned Saturday orientations for the past two and a half years. [Exhs. 8 - 9.] Ms. Trujillo testified she personally delivered a calendar labeled "Worker of the Day"

to Appellant at the end of March with her assignments printed on it. The calendar entry under May 10, 2005 reads, "8:30 am Orientation Annette Williams . . ." [Exh. 10.] Ms. Trujillo added that the 8:30 a.m. start time is also noted on the flyers and the recorded message publicizing the meetings to the general public. Ms. Flores stated that staff is permitted to delay the start of orientation for ten minutes to allow for late-arriving clients as a matter of good customer service. However, staff is still obligated to be in the room at 8:30 a.m. while awaiting the arrival of clients.

Due to ongoing tardiness problems with her staff since she transferred to the unit in July 2004, Ms. Flores stated she has emphasized the importance of timeliness on the delivery of good customer service. She testified that a late start to orientation inconveniences clients, may cause them to lose pay, and may be stressful if their accompanying children become hungry or bored. Ms. Flores believes it may also affect their opinion of the Agency's efficiency and its commitment to serve clients. Ms. Trujillo testified that a late start may require other employees to assist with applications not completed by the scheduled end time of 10:00 a.m.

Ms. Flores testified she decided on a written reprimand after reviewing the supervisor's file, which showed the nature, levels and pattern of Appellant's previous discipline. She had disciplined other employees who violated the attendance policy and were late for orientation, including one who was terminated for chronic tardiness.

Appellant testified that on May 10th, she arrived at work at 6:30 a.m. She received an emergency phone call at 8:25 a.m. that her basement was flooded, so she made two calls to handle the emergency. The Worker of the Day calendar lists the start time for orientation as 8:30 a.m. She testified she entered the orientation room by 8:40. Appellant did not believe she was late because managers Diane Kelly and Ms. Pacetti had instructed her to wait fifteen minutes before beginning orientation to allow clients to arrive. Appellant stated she filled in for tardy employees at least two or three times a week, and that orientation is not a listed duty in her Performance Enhancement Plan.

Appellant believes that Ms. Flores gave her this reprimand and her past reprimands because she did not like her. Appellant testified that Ms. Flores once asked her questions about her sister, who is Ms. Flores' former sister-in-law. Appellant contends the emailed verbal reprimand was withdrawn and replaced by a written reprimand because she complained to Agency Director Roxane White that, at a May 11th meeting of the child care unit, Ms. Pacetti "went haywire" and told the employees they were worthless.

Appellant presented the testimony of co-workers Lisa Linville and Mary Casados, who are also supervised by Ms. Flores. Ms. Linville stated that her practice for seven years of doing the Spanish language orientations was to arrive at 8:30, but to wait fifteen minutes before starting. Ms. Flores gave her Worker of the Day calendars to inform her of the dates on which she was scheduled to do client orientation. Ms. Linville testified she sometimes believes Appellant has been disciplined for minor things while other employees' rule violations were ignored, but she does not believe the written

reprimand was retaliatory. The witness stated she believes she herself deserved the discipline Ms. Flores imposed on her.

Ms. Casados testified that orientation started at 8:30 a.m., but that she was told to give clients ten minutes to arrive. When Ms. Casados was ten minutes late for an orientation, she was given a verbal reprimand. After the meeting at which Ms. Pacetti criticized unit employees, Ms. Casados said all the employees discussed going to Ms. White to complain. That same week, Ms. Casados told Ms. Flores she was upset about the criticism, but Ms. Flores responded that she agreed with Ms. Pacetti. Ms. Casados conceded that nothing happened to her as a result of voicing her opinion. Ms. Casados believes that Appellant was disciplined "a little bit more than most of us workers." Her first notice of the cell phone policy was the May 10th memo. [Exh. A.]

Operations Section Manager Chris Pacetti testified in rebuttal that she implemented the orientation meeting two and a half years ago, and confirmed that staff was told to wait ten or fifteen minutes before starting the meeting to allow clients to arrive. She also testified that division policy forbade the use of cell phones during working hours.

Ms. Pacetti stated she met with the child care unit on May 11th to put the staff on notice of an upcoming audit, and of their need to improve attendance and work accuracy in order to avoid the danger that the program could be contracted out, thus eliminating the jobs within the unit. Ms. Pacetti stated she made it clear she was upset by their performance. Before that meeting, the unit had been warned at least six times about their performance by Ms. Pacetti, Deputy Manager Valerie Brooks, and Director Juanita Sanchez. Ms. Pacetti testified she was unaware of Appellant's discipline by Ms. Flores until after it occurred, and did not order it. Ms. Pacetti later learned that the union had sent a letter to Ms. Sanchez complaining of her meeting comments. As a result, Ms. Sanchez and Ms. Brooks met with Ms. Pacetti to discuss the complaint. Ms. Pacetti was not disciplined as a result of Appellant's complaint.

ANALYSIS

I. Career Service Rules Violations

The Agency has the burden to establish that Appellant has violated the Career Service Rules cited in the disciplinary letter. CRS § 13-25-127.

A. CSR § 16-50 A. 1) Gross Negligence or Willful Neglect of Duty

The evidence shows that Appellant was fifteen minutes late in arriving at her assignment to run an orientation meeting on May 10, 2005. Appellant admits that she was ten minutes late because she had received a phone call about the flooding of her basement. The Agency has presented no evidence that this single incident of tardiness established that Appellant was guilty of gross negligence, which has been defined as an

intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another. In re Owens, CSA 139-04, 5 (3/31/05).

B. CSR § 16-50 A. 7) Refusing to Comply with Order of Supervisor

The Agency has proven that Appellant was ordered to run the May 10th orientation meeting, which was set to begin at 8:30 a.m., and that she arrived fifteen minutes late because she was distracted by a personal phone call. Appellant argues that the call was an emergency which required her to call maintenance and her fiancé to meet the repairman at her house. Appellant was outside walking away from the building at 8:40, and did not mention this emergency to her supervisor immediately thereafter. Appellant could have taken her cell phone to the orientation room and made her calls from an Agency phone during the permitted ten or fifteen minutes before starting the meeting. I conclude that Appellant was not excused from the performance of her duty by the existence of a genuine emergency.

To prove a refusal to obey an order, the Agency must establish that the refusal was intentional or willful disobedience. In re Trujillo, CSA 28-04 (5/27/04). The evidence here indicates that Appellant merely forgot that she was due to start her orientation session. For a period of two and a half years before this day, Appellant had complied with the order by arriving at her assigned orientations in a timely manner. Therefore, I find that the Agency has not established that Appellant intentionally refused to obey the order to be timely to her assignment.

As to the failure to comply with the policy prohibiting use of cell phones during work hours, Ms. Pacetti and Ms. Flores testified there was such a policy, but did not state when that policy was placed in effect. Ms. Casados stated that the policy did not exist until it was declared in Ms. Flores' May 10th email. The email states the policy, ending with, "this is your final warning." Ms. Flores later attempted to rescind the email by sending it to the same distribution list, but witnesses Pacetti, Linville and Casados testified they never received it. Ms. Pacetti's testimony did not indicate that the policy was communicated to Appellant before the incident. Since the burden is on the Agency to prove the existence of an order before the conduct that would violate it occurred, I conclude that the Agency has not proven by a preponderance of the evidence that Appellant violated an order prohibiting the use of cell phones during work hours.

C. CSR § 16-51 A. 2) Failure to Meet Established Performance Standards

The evidence does not include any evidence of performance standards regarding either timely arrival at orientation or the use of cell phones. See In re Routa, CSA 123-04 (1/28/05). Therefore, this violation was not established.

D. CSR § 16-51 A. 6) Carelessness in Performance of Duties

Carelessness is the failure to exercise reasonable care, which is that degree of care which may be expected, having regard to the nature of the action or subject matter

and the circumstances surrounding the transaction. Black's Law Dictionary 146 (abridged 6th ed. 1991).

In July 2004, the child care unit experienced a change in its operations with the transfer of Ms. Flores, who emphasized promptness by the distribution of assignment calendars, and by issuing discipline to those who failed to comply. Appellant was given a written reprimand for tardiness on March 4, 2005. [Exh. 3, p. 2.] She testified that she believed she was not late because she arrived during the fifteen-minute period in which staff was allowed to wait for late clients before beginning. However, all other witnesses agreed that the waiting period did not allow staff to arrive after 8:30 a.m. [Testimony of Flores, Linville, Casados and Pacetti.] Under the circumstances, her failure to appear was careless within the meaning of the rule.

E. CSR § 16-51 A. 10) Failure to Comply with Instructions

To prove a violation of this rule, the Agency must establish that it gave proper instructions to the employee, and the employee failed to comply with them. In re Trujillo, CSA 28-04 (5/27/04). Here, Appellant was instructed to begin orientation at 8:30 a.m. She admitted she was not in the room until 8:40 a.m. As discussed above, Appellant failed to prove the existence of an emergency that may excuse her failure to comply. Appellant also argues that this duty was not included in her Performance Enhancement Program Report (PEPR), and therefore she was not obligated to perform the duty. However, it is well established that an employee may not unilaterally refuse to perform duties not included on her PEP. In re Leal-McIntyre, CSA 77-03, 134-03, 167-03 (1/27/05). Moreover, Appellant performed this duty without protest on weekdays in March and April, and on Saturdays for two and a half years before this incident.

The Agency proved that it clearly instructed Appellant to arrive at the orientation room by 8:30 a.m. Appellant has admitted she was not at the room until 8:40 a.m. Therefore, the evidence shows Appellant was in violation of CSR § 16-51 A. 10).

II. Penalty

The Agency determined that a written reprimand was the appropriate discipline for the above conduct. Appellant claims this is too severe for the misconduct, that past discipline later removed was improperly considered, and that it constitutes a double penalty for the same conduct already disciplined by the May 10th verbal reprimand.

Ms. Flores testified that she imposed the written reprimand after her review of Appellant's personnel file showed Appellant had three previous written reprimands and one verbal reprimand. [Exh. 3, p. 2.] The evidence and administrative records show that the March 4, 2005 written reprimand was withdrawn and replaced by a verbal reprimand after this discipline was imposed. [Exh. F; In re Williams, CSA 35-05 (Order 8/31/05)]. The written reprimand dated October 4, 2004 was likewise subsequently replaced with a verbal reprimand. [In re Williams, CSA 155-04 (Order 5/23/05)].

Past discipline and the current status of that discipline may be considered in a de novo review of the reasonableness of a penalty. Where, as here, the discipline is not overturned, but is reduced to a lesser discipline, only the degree of discipline is changed. The hearing officer may conduct a de novo review of the reasonableness of the current discipline in light of the facts as they exist at the time of the hearing. This approach balances the need for prompt resolution of disciplinary appeals and the requirement of certainty in outcome. Cf. United States Postal Service v. Gregory, 534 U.S. 1 (2001) (holding that the Merit Systems Protection Board (MSPB) may exercise its discretion in reviewing past disciplinary actions to determine the reasonableness of discipline); and Bolling v. Department of Air Force, 9 M.S.P.R 335 (1981) (setting forth the MSPB's review mechanism for consideration of past discipline).

Here, Ms. Flores relied on the existence of past verbal and written reprimands in imposing another written reprimand. Even after the later reductions in discipline, at the time of hearing there remained in Appellant's disciplinary record three verbal warnings and one written reprimand. Ms. Flores was the supervisor during the six-month period when those disciplinary actions were imposed. She therefore had notice of past conduct and discipline for the purpose of tailoring this discipline to the principles governing progressive discipline. Based on these facts and persuasive authority from the MSPB, a similar merit-based employment administrative forum, I find that the Agency's consideration of the two written reprimands that were later reduced to verbal warnings did not render the penalty improper. I also find that a written reprimand was appropriate and reasonably related to the seriousness of the offenses considering Appellant's past disciplinary record, in conformity with CSR §§ 16-10 and 16-20.

As to whether the reprimand constituted double discipline for the same offense, the evidence shows that the May 10th email attempted to impose a verbal reprimand on the entire unit for Appellant's tardiness and use of a cell phone. That email was later rescinded on the advice of Human Resources. The second email was not received by its intended recipients or Ms. Pacetti, all of whom believed at the time of hearing that the verbal reprimand was still valid. This state of affairs caused Appellant to believe that she had been disciplined twice for the same conduct.

The Career Service Rules do not prohibit a supervisor from withdrawing previous discipline. Ms. Flores took prompt but ineffective action to rescind the verbal warning by sending the second email. Her failure to successfully notify Appellant of that action does not render the email ineffective to rescind it. Once rescinded, it cannot be used for any disciplinary purpose against any employee, including Appellant. Thus, only the written warning remains, and Appellant has not suffered two disciplinary actions for the same behavior.

III. Appellant's Claims of Harassment and Retaliation

This appeal raises claims that the Agency harassed and retaliated against Appellant by means of this written reprimand. In support of those claims, Appellant testified that the discipline was increased after she complained to Director Roxane White about the behavior of Operations Section Manager Chris Pacetti. Appellant also contends that Ms. Flores appeared to dislike her based upon the divorce of her sister from Ms. Flores' brother.

The U.S. Supreme Court has repeatedly stated that discriminatory harassment is actionable only if it is "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" Clark County School District v. Breeden, 532 U.S. 268 (2001), *citing* Faragher v. Boca Raton, 524 U.S. 775 (1998). Imposition of a written reprimand and one inquiry into the status of her former sister-in-law are not sufficiently severe or pervasive to adversely change Appellant's working environment. In addition, Appellant has not claimed these acts were taken as a result of any protected status. Appellant has therefore not established a claim of harassment under CSR § 15-102.

CSR § 15-106 prohibits "[r]etaliation against employees for reporting unlawful harassment or discrimination or assisting the City in the investigation of any complaint." Proof of retaliation requires that an appellant demonstrate a causal link between the adverse action and the protected activity. In re Jackson, CSA 103-04, 7 (6/13/05). Appellant bears the burden to establish a prima facie case on the claim of retaliation. Thereafter, the burden shifts to the Agency to establish a legitimate, nondiscriminatory reason for the adverse action. Appellant is then given the opportunity to demonstrate that the claimed reason was a mere pretext for retaliation. In re Garcia, CSA 175-04, 5 (7/12/05); *citing* Poe v. Shari's Mgmt Corp., 1999 US App. LEXIS 17905 (10th Cir. 1999).

Appellant testified that she was verbally reprimanded on May 10th, then given a written reprimand three days later for the same behavior. On May 11th, Ms. Pacetti made critical comments to the child care unit about its performance. Some time thereafter, the union sent a letter to Agency Director White communicating Appellant's complaint about Ms. Pacetti's comments. Ms. Flores testified that she had already decided to issue the written reprimand at about 9:00 a.m. on May 10th, before Appellant could have made her complaint. The written reprimand was hand delivered to Appellant on May 13th.

Appellant's co-worker Lisa Linville stated she believed Appellant was disciplined for minor things, but did not think Appellant's written reprimand was retaliatory. Ms. Casados testified she thought Appellant was disciplined more than others. However, when Ms. Casados engaged in the same behavior as Appellant, i.e., making a complaint to Ms. Flores about Ms. Pacetti's comments, she suffered no resulting retaliation.

This evidence does not establish that Appellant engaged in a protected activity by complaining of Ms. Pacetti's comments. Appellant was neither "reporting unlawful harassment or discrimination or assisting the City in the investigation of any complaint", as required by CSR § 15-106. A supervisor's critical comments on performance issues do not by themselves constitute discriminatory harassment. Appellant failed to demonstrate that the comments were themselves discriminatory on any basis protected under the Career Service Rules. CSR § 15-106. Moreover, Appellant failed to prove a causal connection between her complaint and the issuance of the written reprimand. Appellant did not rebut Ms. Flores' testimony that she did not learn of Appellant's complaint until after she decided to issue the reprimand. Appellant also did not offer any evidence as to why Ms. Flores would be motivated to take action against Appellant because of her criticism of Ms. Pacetti.

Appellant also offered the theory that Ms. Flores did not like her for reasons she did not know, and that Ms. Flores once asked Appellant about Appellant's sister, who had been divorced from Ms. Flores' brother for the past twenty years. This evidence does not prove that Appellant engaged in a protected activity, or that the reprimand was motivated by any protected activity.

I find therefore that Appellant has not established that either discriminatory harassment or retaliation motivated the written reprimand.

ORDER

Based on the foregoing findings of fact and analysis, the Agency's written reprimand of Appellant dated May 13, 2005 is AFFIRMED.

Dated this 17th day of November, 2005.


Valerie McNaughton
Hearing Officer for the
Career Service Board

CERTIFICATE OF DELIVERY

I hereby certify that I have forwarded a true and correct copy of the foregoing **ORDER** by depositing same in the U.S. mail, postage prepaid, this 17th day of November, 2005, addressed to:

Teresa A. Zoltanski, Esq.
1580 Logan St., Ste. 310
Denver, CO 80203

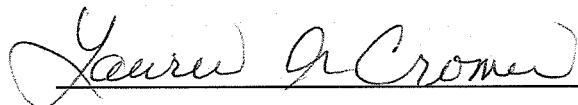
Annette Williams
3528 S. Depew, #10
Denver, CO 80235

I further certify that I have forwarded a true and correct copy of the foregoing **ORDER** by depositing same in interoffice mail this 17th day of November, 2005, addressed to:

Dianne Briscoe
Assistant City Attorney
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Denver, CO 80204

City Attorney's Office
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Laurel A. Cromer