

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 92-09

DECISION

IN THE MATTER OF THE APPEAL OF:

RYAN S. O'MEALLIE, Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Ryan O'Meallie, appeals his dismissal from employment by the Department of Human Services (Agency). A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on June 1, 2010. The Agency was represented by Assistant City Attorney Neils Loechell. Michael O'Malley, Esq., represented the Appellant. Agency exhibits 1-13 were admitted. The Appellant offered no additional exhibits. The following witnesses testified for the Agency: the Appellant; Steve Bates; Trisha Creech; and Allen Pollack. In addition to testifying on his own behalf, Dawn Green testified for the Appellant. For reasons which follow, the Agency's termination of the Appellant's employment is **AFFIRMED**.

II. ISSUES

The following issues were presented for appeal.

- A. Whether the Appellant violated any of the following Career Service Rules (CSR): 16-60 A., B., J., K., L., or Z.
- B. If the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to terminate his employment conformed to the purposes of discipline under CSR 16-20.

III. FINDINGS

O'Meallie was employed as a Youth Worker in the Family Crisis Center (FCC) for four years, working the overnight shift, from 10:30 p.m. to 8:30 a.m. The FCC houses youth, ages 12-18, who are assigned there through the courts due to delinquency, family problems at home, developmental disability, absence

from school, inappropriate sexualized behaviors, and child abuse. Since some residents are perpetrators of violence, and others are victims, it is a critical function of FCC staff to ensure the safety of its residents. Staff members are trained in, and obligated to follow closely, the FCC Program Guide for monitoring and insuring safety of residents and staff by the use of appropriate intervention and the use of progressive discipline pursuant to the FCC program policies. In order to ensure consistency in the treatment of residents, staff may not vary from the program policies unless they can articulate the need for variance, and even then, only with supervisor approval, absent a "crisis." [Exhibit 1-2, FCC Policies & Procedures Manual, section 3: Youth Services Programming].

On August 24, 2009, O'Meallie was on duty as the lead worker, assisted by a co-worker, when the following events occurred. (1) One youth assaulted another, and "body-slammed" him. (2) Youth entered the staff area; (3) Youth were going through the cabinets, confidential areas, and supply areas; (4) One youth was standing on a staff chair behind the staff desk, twirling around as he stood on the chair; (5) One youth was shooting staples at another; (6) Youth were sitting and lying on the staff desk counter and one youth was doing push-ups on the counter.

The events described above were recorded by the FCC security system. With respect to the assault, the recording, Exhibit 5, which does not have an audio component, revealed the following sequence of events according to the minute:second time stamp in the post-recording player.

At 13:00 minutes O'Meallie was standing outside the staff area, apparently talking on the staff phone when an apparent commotion drew his attention to the next room. At 13:05 two males who had been only somewhat visible in the next room, entered into the main area, and were wrestling aggressively in the area where O'Meallie was still on the phone. O'Meallie glanced over to the scuffle, but then turned his attention back to the phone call. At 13:15, the larger youth body slammed the much smaller youth, but O'Meallie was finishing his phone call and was not looking at them. At 13:19 O'Meallie walked directly toward both youth who were still wrestling aggressively. He paused to watch, then turned down a corridor to the left without intervening. The youth continued to wrestle as O'Meallie walked by. They continued to fight after O'Meallie left the area. Another male then joined in the wrestling against the smaller youth. He held the smaller youth while the first larger youth punched the smaller youth once, then left the other two, still wrestling on the floor, directly in front of the staff desk. No staff member was present at the desk or in view of the video camera after O'Meallie left the area.

O'Meallie's supervisor, Trisha Creech, and FCC Director Steve Bates, interviewed O'Meallie about the incident on September 9, 2009. In the interview, O'Meallie stated the FCC program is "trash," [Exhibits 1, 4 (2).e, 9], that

intervention in what he termed “horseplay” is appropriate only when he deemed it necessary, and that physical acting out is appropriate, based on his own upbringing.

A pre-disciplinary meeting was convened on October 5, 2008. O’Meallie attended without representation, and provided written and oral statements. The Agency issued its termination notice on October 9, 2009. This appeal followed on October 21, 2009.

IV. ANALYSIS

A. Jurisdiction and Review

Personal jurisdiction. As a Career Service employee, O’Meallie was entitled to appeal his discipline under the Career Service Rules. Denver City Charter, §§ 9.1.1. E.(vi), 9.8.2.(A); CSR 19-10 A.1.a.

Subject matter jurisdiction is proper under CSR §19-10 A.1.a., as the direct appeal of a dismissal. 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 O’Meallie violated one or more cited sections of the Career Service Rules, and to prove its decision to terminate his employment complied with the purposes of discipline. CSR 16-20. The standard by which the Agency must prove its claims is a preponderance of the evidence.

C. Career Service Rule Violations

1. CSR 16-60 A. Neglect of duty.

This rule is breached when an employee neglects to perform a job duty which the employee knows he or she is supposed to perform. In re Campos, CSB 56-08, 2 (5/21/09) *modifying In re Campos*, CSA 56-08, 14 (12/15/08). While O’Meallie, at various times, disagreed with the FCC policies, he acknowledged he was under a duty, but chose to ignore, its directives to intervene and to assess appropriate discipline for misbehavior.¹ [FCC Policies & Procedures Manual, section 3, Exhibit 102]. [O’Meallie testimony; Exhibit 1-4].

O’Meallie claimed the following defenses. (1) Every staff member disregards

¹ At times, throughout the case, O’Meallie claimed he did not understand FCC policies; however, it was apparent, from the totality of the evidence, that he simply disagreed with, rather than failed to understand, FCC policies and procedures. For example he stated he was trained in, and understood the policies, but chose to ignore them, (“I admit I was lax about enforcing rules”), based on his own upbringing. [Exhibit 13; 2/12/10 O’Meallie testimony].

the FCC policy manual. [O'Meallie testimony]. In support of this contention, O'Meallie presented the testimony of Dawn Green. Green is a Youth Worker and former colleague of O'Meallie. She testified O'Meallie followed the rules as well as anyone, however she was not present for the assault on August 24, 2009 and, contrary to O'Meallie's claim, she testified "if you see a fight you have to try to diffuse it." [Green testimony]. (2) Horseplay is good for kids, and intervention is appropriate only when he (O'Meallie) deems it to be excessive. [Exhibit 4-2]. This statement undermines the very purpose of the FCC, to prevent, re-direct, limit, and control such learned behaviors, not to encourage them. [Bates testimony]. O'Meallie's only support for this assertion was Green's testimony, which was shown not to sustain his allegation. 3) Since he did not witness either the fight or youth entering the staff desk area, O'Meallie cannot be held accountable for those misbehaviors. [Exhibit 4]. The video evidence was not rebutted and clearly establishes O'Meallie's failure to intervene in his charge's assaultive behavior. In addition to the forgoing, O'Meallie acknowledged "I agree with the statement that I am 'passive,' not wanting to get clients into more trouble than they are already in." [Exhibit 4-2]. FCC policy and training require proactive interaction, not passivity. (4) O'Meallie stated his former supervisor was lax in upholding FCC policies, so that when his new supervisor, Bates, came aboard and required staff to adhere strictly to FCC policies, O'Meallie had to change four years of lax habits. First, O'Meallie acknowledged "I admit I was lax about enforcing rules." [O'Meallie testimony 2/12/10]. He also was on notice at least since January 2009, when he was counseled about intervention and enforcement of disciplinary sanctions for fighting. He also stated, at first, that he was glad he was finally caught not enforcing the Center's rules. [Id]. When shown Exhibit 1-3, regarding all the misbehaviors by residents on the night of August 24, and asked if he disagreed with any of them, O'Meallie stated "No I don't." [Id]. O'Meallie's failure to intervene in the assault and enforce discipline were a breach of his duty to follow the FCC program policies, in violation of CSR 16-60 A.

The Agencies other neglect claims were not established by a preponderance of the evidence. The Agency's claim that youths were not allowed behind the staff desk area were rebutted by O'Meallie and Green who testified that, at times, youth have permission to go there. [O'Meallie testimony; Green testimony]. There was no evidence that doing pushups on the staff counter was against FCC rules.

2. CSR 16-60 B. Carelessness in performance of duties and responsibilities.

While CSR 16-60 A) and CSR 16-60 B), share similar elements of proof, they are distinguished in that, under 16-60 B., it is the Appellant's acts (performance), rather than his omissions (neglect), which are reviewed. See In re Simpleman, CSA 31-06, 4-5 (10/20/06). Thus, a violation under this rule occurs for performing poorly, rather than neglecting to perform, an important duty. Since the Agency's evidence proves O'Meallie failed to intervene at all, rather than intervening ineffectively, this rule is

inapplicable.

3. 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.

This rule contains two discrete violations, failure to comply with an order and failure to perform assigned work, whether or not under direct order. In re Mounjim, CSA 87-07, 7 (7/10/08), citing In re Dessureau, CSA 59-07, 7 (1/16/08). The Agency presented no evidence of O'Meallie violating a direct order. His performance failures are more accurately reflected in the discussion above, regarding neglect of duty, and below, regarding written departmental policies. No further consideration is due under this rule.

4. CSR 16-60 K. Failing to meet established standards of performance including either qualitative or quantitative standards...

This rule covers performance deficiencies that can be measured either by qualitative or quantitative standards, such as those one would find in a performance evaluation. In re Castaneda, CSA 79-03, 12 (12/18/02). The Agency cited O'Meallie's performance review (PEPR) in its termination letter. Many of the cited provisions are aspirational, and therefore not enforceable. However, under the heading of "Safety," O'Meallie's failure to intervene to prevent the assault of one youth by another on August 24 was a violation of two provisions stating "[t]akes personal responsibility for workplace safety," and "[c]onsiders the safety of others and acts to promote a safe environment." [Exhibit 1-1]. O'Meallie's failure to intervene in the August 24 assault also violated the PEPR provision entitled "Job Duties...2. Implements behavior management techniques as trained and uses appropriate interventions as needed per progressive discipline sequence per program policies." Each of these violations establishes a separate violation of CSR 16-60 K.

5. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules...

Under this rule, the Agency is obligated to cite the specific regulation, policy or rule allegedly violated. The Agency accused O'Meallie of breaching FCC Policies & Procedures Manual, section 3: Youth Services Programming. That policy requires appropriate intervention and discipline for misbehavior. The Agency claimed O'Meallie violated that policy by failing to intervene in the August 24 assault.

O'Meallie's evidence only reinforced that he was on notice that trouble was brewing before the assault. He stated that, earlier on the morning of August 24, "the aggressor in the assault adamantly refused to get out of bed and I had to make arrangements to have an additional staff sent up so he could be monitored." [Exhibit 4 (1)d]. Thus, O'Meallie was aware the youth was causing problems before the assault. O'Meallie also claimed he was not present during

the assault, because he was in a nearby corner dealing with another youth. [O'Meallie testimony]. It is apparent in the video recording of the incident that O'Meallie was witness to violence. Most concerning, O'Meallie watched the much larger youth assaulting a smaller youth, but left the area altogether while the assault continued without intervening in any discernable manner. This violation is established by a preponderance of the evidence.

6. 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 an employee's conduct hindered an 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). The Agency proved O'Meallie's failure to intervene in the August 24 assault was in violation of the mission of the FCC, to provide a safe environment for its residents. [Bates testimony]. the Agency proved the most serious allegations against O'Meallie. What remains is a discussion of the propriety of the degree of discipline chosen by the Agency.

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 proven offenses.

O'Meallie was the lead worker on August 24, 2009. He was therefore responsible to demonstrate adherence to protocol by his example, something he failed to do. More importantly, it is difficult to imagine a more serious breach of FCC policy and the Career Service Rules, than for an employee who is charged with establishing and maintaining a safe environment, willingly to permit the assault of one under his supervision, against another.

B. Past Record

In March 2007, O'Meallie was assessed a written reprimand for allowing a master key to be missing when he was the last person known to have it, and left it in an unlocked drawer. O'Meallie countered the Center was at fault for not having strict policies about keeping keys locked, and that he had no formal training in keeping keys safe.

In October 2007, O'Meallie was assessed a verbal reprimand for failing to take a head count to determine a youth was missing and had run away. He agreed he engaged in wrongdoing in that incident.

More pertinently, O'Meallie was counseled in January 2009 as to what procedures and discipline were proper after he failed to handle a prior assault appropriately. He was therefore on notice, seven months before the August 24 assault, what protocol was expected, contrary to his part-time assertions. Moreover, O'Meallie acknowledged his familiarity with the program policies regarding intervention and discipline before the August 24 assault occurred.

C. Penalty most likely to achieve compliance.

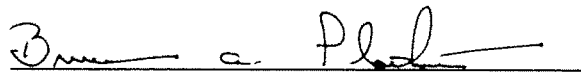
O'Meallie claimed his penalty was excessive, [Appellant opening, closing statements; appeal]. O'Meallie stated he is capable of change, and at times, earlier in the case, apologized, even in a self-deprecating manner. During his pre-disciplinary meeting, O'Meallie announced he was "major major negligent," "the worst employee ever," and held himself fully accountable for the incidents of 8/24/09. However, his acknowledgement of wrongdoing alternated with his denial of responsibility. At hearing, he explained his earlier apology during the pre-disciplinary meeting was the result of his exhaustion, feeling unwell from leg pain, and not being himself. He blamed uncontrollable FCC youth, stated, without evidence, that all youth workers disregard the rules and disparaged FCC program requirements until the date of hearing. Given the ongoing dichotomy between O'Meallie's confessions, his assignment of blame onto others, and his disparaging the FCC Program Policy, the Agency was not obligated to engage in a guessing game of which assertions were accurate. Because the Agency counseled O'Meallie seven months before the August assault, and because O'Meallie's repeatedly insisted he knew best how to handle violent behaviors, the Agency was justified in concluding O'Meallie's belated promise to change was not in the offing.

Based upon the discussion, above, the Agency's election to dismiss O'Meallie was neither clearly excessive nor based upon considerations unsupported by a preponderance of the evidence. In re Mounjim, CSA 87-07, 18 (7/10/08), *citing* In re Delmonico, CSA 53-06, 8 (10/26/06).

VI. ORDER

The Agency's decision to terminate Mr. O'Meallie's employment on October 9, 2009, is **AFFIRMED**.

DONE June 18, 2010.



Bruce A. Plotkin
Career Service Board Hearing Officer