

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

Appeal No. 123-04

AMENDED DECISION - ERRATA

IN THE MATTER OF THE APPEAL OF:

WAUNITA ROUTA, Appellant,

vs.

CLERK AND RECORDER, Agency,
and the City and County of Denver, a municipal corporation,

This Amended Decision corrects grammatical errors in bold and deletes a paragraph previously added in error in the original Decision on page six.

I. INTRODUCTION

The Appellant, Ms. Waunita Routa, appeals a three-day suspension by her employer, the Clerk and Recorder's Office (Agency). The Agency suspended the Appellant for alleged violations of the Career Service Rules (CSR). A hearing concerning this appeal was conducted January 11, 2005 by Hearings Officer Bruce A. Plotkin. The Appellant appeared with David Calvert, Esq. The Agency was represented by Christopher M.A. Lujan, Esq. with Director Wayne Vaden serving as the Agency's advisory witness.

Agency Exhibits 1-4 were admitted without objection, while Exhibits 5-11 were withdrawn. Appellant's Exhibit C was admitted without objection. Exhibit A was admitted over the Agency's objection. Appellant's Exhibit B was denied as not relevant.

The Agency presented Ms. Chelsea Shea, Mr. Juan Northcross and Clerk and Recorder Wayne Vaden as its witnesses. The Appellant alone testified for her case-in-chief.

II. ISSUES

The following issues were presented for appeal:

A. whether the Appellant has stated a claim upon which the Hearings Officer has jurisdiction to grant relief;

B. whether the Appellant was in violation of CSR §§16-50 A. 2), 4), or 6);

C. if the Appellant violated any of the above-referenced rules, whether the Agency's three-day suspension was reasonably related to the seriousness of the offense and took into consideration the Appellant's past disciplinary record.

III. BACKGROUND

The Appellant is an Administrative Assistant for the Agency, where the public comes to do such business as obtaining marriage licenses, recording real property documents, and recording official city functions. Prior to May 12, 2004, the Appellant occupied a work space adjacent to Clerk and Recorder Wayne Vaden's (Vaden) office. The Appellant's work area is in an open, public area. Prior to May 12, 2004, the Appellant served as an assistant to Vaden, scheduling appointments and meetings, taking phone calls, purchasing, tracking some budget items, filing and otherwise acting as "the face of the Agency" to the public and to outside vendors. [Vaden, Appellant testimony].

On May 12, 2004, between 9:00 and 10:00 a.m., Vaden was in his office in a meeting attended by several people including Ms. Sheila Palermo (Palermo), an Agency employee. During, or shortly after the meeting, Ms. Chelsea Shea (Shea) entered the Agency to see Palermo. Shea represents an outside consultant to the Agency and knew Vaden, Palermo, and the Appellant from previous meetings. Seeing that Palermo was in a closed-door meeting with Vaden, Shea asked the Appellant to schedule an appointment with Vaden. According to Shea, the Appellant then spontaneously stated "fucking Sheila (Palermo) shouldn't be in there...she fucking drives me crazy...I am going to a doctor and on medications because of her...she is always doing something besides her real job, attending meetings that she doesn't belong in." [Shea testimony, Exhibit 3]. A co-worker, Mr. Juan Northcross (Northcross), was nearby at the time.

Shea reported the incident to Vaden when they next met, approximately one week later. [Vaden testimony]. Vaden then undertook an investigation into the alleged incident. Based on his investigation, Vaden served a Notice of Disciplinary Action on the Appellant June 24, 2004. [Exhibit 4]. Vaden conducted a Pre-Disciplinary Meeting on July 14, 2004, attended by the Appellant and her legal counsel, David Calvert, Esq. Vaden, staff assistant Linda Strausheim, and Assistant City Attorney Sybil Kisken represented the Agency. Vaden served a three-day suspension on the Appellant July 29, 2004, effective August 2 through August 4, 2005. The Appellant filed her appeal of that suspension on August 5, 2005.

IV. JURISDICTON

Jurisdiction was not challenged by the Agency. The Hearings Officer finds the subject of discipline of a Career Service employee is a proper matter for resolution at hearing. The Appellant timely filed her appeal and is properly before the Hearings Officer.

V. RULES VIOLATIONS ALLEGED BY THE AGENCY

1. CSR 16-51 A. 2) Failure to meet established standards of performance including either qualitative or quantitative standards.

This provision covers performance deficiencies that can be measured by either qualitative or quantitative standards, such as in a performance evaluation, in a classification description, or in an agency or division's policy and procedures. In Re Cedillo, CSA Appeal #130-02 (8/2/02). Three requirements are prerequisite to finding a violation of this rule: 1. a prior-established standard 2. clear communication of that standard to the Appellant, 3. the Appellant's failure to meet such standard. See, e.g. Pabst v. Industrial Claim Appeals Office, 833 P.2d 64, 64-65 (Colo. App.1992).

When asked if he covered the Appellant's duties with her when he began as Clerk and Recorder, Vaden replied "it was the opposite. I was new. She told me what she did for previous Clerks, and I sorta went with the flow." Vaden also stated "I expected [the Appellant] to act in a professional manner when dealing with people who deal with me." [Vaden testimony]. However, it was unclear if Vaden's expectation was based upon any established standard or if such standard was clearly communicated to the Appellant. Other than those statements, there appears to be no evidence presented by the Agency which addressed CSR 16-51 A. 2). Presumably, as a Career Service Employee, the Appellant had annual performance reviews which may have contained performance standards, but those reviews were not in evidence.

The Agency concluded the Appellant violated CSR 16-51 A. 2) for failure to maintain good customer service relations with Shea. [Agency closing statement]. The Hearings Officer respectfully disagrees. The Agency's conclusory requirement to maintain good customer relations does not constitute evidence of an established standard. Even if good customer relations may seem evident in all dealings with the public, "self-evident" standards represent a dangerously subjective measure of an employee's performance. Thus, without presenting some objective evidence of an established standard, even if by custom or use, the Agency cannot prove the Appellant violated CSR 16-51 A. 2) by a preponderance of the evidence. Compare, e.g. In Re Tafoya, CSA Appeal #72-04 (10/29/04) (Appellant failed to abide by the terms of a Performance Evaluation Plan (PEP) regarding Customer Service). The Hearings Officer finds the Agency has not proven the Appellant violated CSR 16-51 A. 2) by a preponderance of the evidence.

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

The Agency bases its finding that the Appellant violated this rule upon Vaden's conclusion that the Appellant spoke about her co-worker, Palermo, with the words and in the manner that Shea described. This conclusion requires carefully weighing Shea's credibility.

Shea stated she had met with the Appellant many times before May 12, and each time their contact was pleasant and professional. [Shea testimony]. This impression was not disputed by the Appellant. Shea testified at hearing "the Appellant's comments about Palermo made me feel very uncomfortable. I was taken aback because that is not what I deem to be a professional way that you describe a co-worker. It was information that shouldn't be shared in a professional environment." Shea added since May 12th, she does not communicate with the Appellant and is uncomfortable around her. *Id.*

Shea's discomfort at the Appellant's alleged comments concerning Palermo was evident in her testimony, as Shea was highly reluctant to repeat the Appellant's alleged expletives, and did so only after being so instructed. If Shea intended to provide an inaccurate account of the Appellant's words, that intent would be contrary to her reluctance to repeat what she heard.

The Agency also presented the testimony of Juan Northcross (Northcross) to support its finding that the Appellant uttered the above-mentioned expletives regarding Palermo. Northcross was nearby when the Appellant spoke with Shea. Northcross stated he did not hear what the Appellant said. When asked to describe the Appellant's tone, Northcross had great difficulty deciding that the Appellant assumed any particular tone, and finally settled on describing her tone as "a mixture of annoyance, playfulness... happiness... and lightheartedness." This left Northcross somehow uncomfortable, although he could not decide why. He also described Shea's expression as blank. Northcross' testimony must be disregarded as unhelpful in deciding whether to believe Shea or the Appellant.

The Appellant denied she ever disparaged Palermo to Shea; however she presented no credible reason for Shea to have testified inaccurately. Other than to acknowledge Shea asked for an appointment with Vaden on May 12, the Appellant's only testimony concerning Shea, was to state Shea had lunch often with Vaden and Palermo. Since the Appellant did not then draw any conclusions from that observation, the Hearings Officer concludes she intended one of two inferences: either Shea was close personally to Vaden and Palermo, or her company was close to Vaden and Palermo, either relationship implying a motive to provide inaccurate information at hearing. If the Appellant intended to infer Shea maintained a cozy personal relationship with Vaden and Palermo, and therefore gave an inaccurate account of what happened on May 12, the Appellant did not pursue the inference, and the Hearings Officer has no basis for making such a conclusion. As for the possible corporate motive, Shea stated the Agency's business with her company

represents far less than one percent of her company's business, defeating the second inference that her company would have a financial incentive falsely to back the Agency against one of its employees.

The Hearings Officer concludes the level of Shea's discomfort discussing the Appellant's language was genuine, and the Appellant raised no improper motive to change this impression. Both Shea's and the Appellant's recollection of the Appellant's words to Shea on May 12 cannot be true, but Shea is believable by a preponderance of the evidence, while the Appellant has an obvious incentive to recall the events of May 12 less accurately than Shea. Thus, the Hearings Officer concludes Shea accurately recalled the Appellant's words and demeanor concerning Palermo on the morning of May 12, 2004.

The Appellant's diatribe against Palermo constitutes an obvious failure to maintain a satisfactory relationship with that co-worker. The Appellant also failed to maintain a satisfactory relationship with Shea since, due to the incident, Shea now avoids the Appellant and feels uncomfortable around her. The Appellant's failure to maintain satisfactory relationships with Palermo and Shea constitute a violation of CSR 16-51 A. 4) by a preponderance of the evidence.

3. Carelessness in performance of duties and responsibilities.

The Agency declared its proof that the Appellant violated this rule was the same as for the Appellant's violation of CSR16-51 A. 2), failure to maintain good customer relations. In addition, the Agency claimed the Appellant violated this rule by making derogatory remarks about a co-worker to someone outside the Agency. [Agency closing]. Vaden testified he found the Appellant's comments to Shea were unprofessional and reflected badly on the Agency. The Hearings Officer agrees; however, the Appellant's lack of professionalism and derogatory remarks about her co-worker do not easily equate with carelessness in the performance of a duty or responsibility. As concluded in the discussion of CSR 16-51 A. 2) above, imputing a duty of good customer relations to the Appellant, without more, is insufficient to establish a violation of this rule by a preponderance of the evidence.

The Appellant's conduct may have been more aptly proscribed under Executive Order 112, Violence in the Workplace. See, e.g. In Re Day, CSA Appeal # 12-03 (10/9/03) (Appellant's loud outburst at work: "I wish they'd let me do my f---ing job," accompanied by period of rage, was found to be a violation of Executive Order 112, when three co-workers overheard, and were still frightened by the outburst ½ hour later). *Id* @ p.8. Executive Order 112, however, is not before the Hearings Officer, so no conclusion may be made whether the Appellant violated it.

VI. CONCLUSION

Based upon his findings above, the Hearings Officer concludes the Agency proved the Appellant violated CSR 16-51 A. 4) by a preponderance of the evidence, while it failed to prove the Appellant violated CSR 16-51 A. 2) or 6) by a preponderance of the evidence. Having found the Appellant violated a Career Service Rule, the Hearings Officer must determine the propriety of her three-day suspension.

VII. PROPRIETY OF THE THREE-DAY SUSPENSION

The Agency must assess the degree of discipline that is reasonably related to the seriousness of the offense and that takes into consideration the Appellant's past record. CSR 16-10. This incident, taken alone, may have been insufficient to merit a three-day suspension. [**Remainder of paragraph deleted**]

Two aggravating factors figure into the discipline in this case. First, the Appellant acknowledged she was ordered to a mental health clinic following the incident. The doctor at the clinic refused a Return to Work Pass as the Appellant expressed "intense hatred" of Palermo. This level of animosity surpasses mere dislike, and suggests a possible violent intent. Second, the Appellant was the "face of the Agency" to the public and represented Vaden to others such as Shea who had business with the Clerk and Recorder. This exposure required the Appellant to act with the utmost care in her contact with others within and outside the Agency, something she failed to do here. Given these additional factors, and in light of the Appellant's recent, similar violation, the Agency's discipline of the Appellant was commensurate with the violation, taking into consideration the Appellant's past record.

VIII. ORDER

The Agency's imposition of a three-day suspension to the Appellant on July 29, 2004, served from August 2 through 4, 2004, is hereby AFFIRMED.

DONE this 27th day of January, 2005.

Bruce A. Plotkin
Hearing Officer
Career Service Board

H:/Cases/Routa, Waunita 123-04/Decision Errata
S:/Hearings/Decisions/Routa, Waunita 123-04 Errata

CERTIFICATE OF MAILING

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

David Calvert, Esq.
6400 S. Fiddler's Green Cir. Suite 2020
Greenwood Village, CO 80111

Ms. Waunita Routa
2772 Julian Street
Denver, CO 80211

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

Christopher M.A. Lujan, Esq.
Litigation Section
City Attorney's Office

Wayne Vaden, Director
Clerk & Recorder
