

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 10-08

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

PAUL SIENKIEWICZ, Appellant,

vs.

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

The hearing in this appeal was held on April 16, and May 7, 21 and 28, 2008 before Hearing Officer Valerie McNaughton. Appellant Paul Sienkiewicz was present and represented by Michael O'Malley, Esq. The Agency was represented by Diane Briscoe, Esq., and its advisory witness was Agency Human Resources Director Jennifer Fairweather. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact, conclusions of law and enters the following order.

I. INTRODUCTION

Appellant Paul Sienkiewicz appeals his termination dated Feb.4, 2008 from the Denver Department of Human Services (Agency). Appellant filed a timely appeal of the action on Feb. 13, 2008 pursuant to the jurisdiction provided in the Career Service Rules (CSR) § 19-10 A. 1. a.

Agency exhibits 3 -13, and 15 and Appellant's exhibits MM and RR were admitted during the hearing.

II. ISSUES

The following issues are raised in this appeal:

1. Did the Agency prove by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules, and
2. Was termination within the range of discipline that could be imposed by a reasonable administrator based on the proven violations of the Career Service Rules?

Senior Human Resources Professional Deborah Arter testified that at about 9:30 a.m. on Dec. 24, 2007, she witnessed Appellant enter the file room with a four-inch stack of documents, some of which were yellow forms. At 1:45 p.m., she saw him leave the file room with what looked like the same stack of papers, go into the copy room, and leave a minute later without the stack. Ms. Arter became suspicious. On the next work day, Dec. 26, 2007, she asked for and obtained the key to the shredder bin. Ms. Arter pulled out a four-inch stack of papers containing workers' compensation forms such as occupational health reports and general admissions of liability. She then put the stack in a box under the desk in the Director's office for safekeeping. Ms. Arter thereafter reported what she had seen to the Director. At the hearing, Ms. Arter identified a two-inch stack of papers as similar in appearance to the stack she had seen in Appellant's arms that day. [Testimony of Deborah Arter.]

On Dec. 31st, Ms. Arter showed the stack of papers she had found in the shredder bin to Sr. Personnel Analyst Leah DiMarco. They opened the other bins, which were all one-third full of paper. There were 281 documents found in the bins, including workers' compensation documents that were sorted together, FML documents, and draft letters written by other analysts. Ms. DiMarco checked the personnel files for duplicate copies, and determined that there was only one. [Exh. 11-19.]

Ms. DiMarco then created a log of all pages retrieved from the bins. [Exhs. 11-13 to 11-20.] Among them were all five pages of an Employee Work Injury Report for employee Ben Levek. [Exh. 11-17.] Ms. DiMarco concluded that if these documents had been shredded, there would have been no record of the employee's injury or his claim for workers' compensation. Also found were clinic passes signed by the medical provider, and some original medical documents that belonged in the employee's medical file. About fifty of the documents taken from the bins were related to FML. [Testimony of Leah DiMarco.] After finding the documents in the bins, Ms. Metoyer, Ms. Fairweather and Ms. DiMarco decided to place Appellant on administrative leave. When Appellant was called to inform him of that decision, he stated he was not aware of the department's document retention policy.

Federal law requires retention of FML documents for a minimum of three years. The law also prohibits filing medical records in personnel files. 29 C.F.R. § 825.500(g); 5 No. 11 Fam. & Med. Leave Handbook Newsl. 6. All members of the Human Resources staff have access to the files kept in the unit, and may use FML or compensation documents from closed cases to provide advice regarding work restrictions, leave abuse, or other personnel issues. Medical files are kept in the locked file room, but all members of the staff have access to that room.

The agency's file retention policy is contained in its Privacy and Security Manual, with a listed effective date of May 21, 2007. HR Director Jennifer Fairweather drafted the policy in order to centralize document retention practice after observing that employees "seemed to be keeping things forever". The undisputed testimony indicates that the May policy was treated as a draft until after a period for employee input and

training, which concluded in November 2007. [Exh. 11-41.] That policy stated that “[c]lient information will not be maintained by the Department any longer than required, and cases will be shredded upon reaching the retention deadline.” Under the policy, both FMLA and workers’ compensation files are to be kept by the Human Resources unit no longer than five years. Cases “will be destroyed” unless there is a pending claim for \$1,000 or more, or it has not been investigated for ten years. “Any case files being reviewed by an auditor or related to a pending lawsuit (based on a Litigation Hold implemented by the City Attorney’s Office) can not be destroyed . . . until the auditor or court has concluded the matter and the case file is no longer required.” [Exhs. 11-39 to 11-42.]

Ms. DiMarco stated that it is common knowledge among human resource professionals that every organization must have a document retention policy. When Ms. DiMarco began with the Agency in September 2006, she inquired about its retention policy, and was told by Ms. Fairweather that documents were retained for five years. She attended the 2007 power point training on the new privacy and security policy. Ms. DiMarco testified that the retention policy does not require keeping duplicate copies of documents retained elsewhere.

Appellant testified that he has twenty-three years’ experience in the human resources field. He learned the workers’ compensation area on the job by working with the city’s Risk Management department, which handles compensation claims filed by city employees. He was the sole analyst in the HR unit assigned to cover the personnel issues arising from compensation claims. Appellant stated he was not instructed to file or store those documents in any particular manner. Before this disciplinary action was taken, he did not believe the Agency had a policy against purging his copies of such documents, since Risk Management separately maintains the case files for compensation claims filed against the Agency. After a claim was filed, Risk Management would furnish Appellant with a copy of documents for his own reference. If Appellant needed additional documents about the claim, he requested them from Risk Management, which promptly transmitted them to him.

Appellant denies purging any FML documents. [Exh. RR-3.] At the pre-disciplinary meeting, Appellant was shown the log of documents from the shredder bin, and denied placing any FML documents in the bin. [Testimony of Ms. Fairweather.] He stated he was unaware of the retention policy implemented in September 2007, but acknowledged that Human Resources Manager Jennifer Fairweather emailed him a copy of the retention schedule in November 2007. [Exhs. 11-41, 11-42.] Appellant explained that it was his file management practice to purge his files of unnecessary documents about four times a year. He would take the files to be purged to the file room, separate the notice of claim in each file from other documents he considered extraneous, and place the unnecessary documents in the shredder bin. It was also his practice to re-file any FML documents in either the personnel or medical file, or place them in the “file missing” basket in the file room if he could not locate the file jacket, in keeping with the unit’s ordinary practice. Appellant denied purging the Ackland, Harris

and Saitta FML files, but said he believed he saw those documents in the "file missing" basket. [Exhs. RR-2, RR-3.]

Because Appellant's work load in December 2007 was slow, Appellant used the time to purge unnecessary worker's compensation documents from his files twice that month. He recalled taking some documents to the copy room on or about December 24th, and placing all of them in one of the bins. Appellant testified that those documents numbered significantly fewer than the 281 listed on Ms. DiMarco's log. In his written response submitted at the pre-disciplinary meeting, Appellant explained that his "decision to selectively handle the files" was not an intentional breach of an internal retention policy, since he was unaware of the policy. He apologized to his supervisor for breaking the trust they developed, and stated, "I deeply regret that." [Exh. RR-8.] Appellant added that, "[h]ad I been operating with that policy in mind, I would have proposed that we maintain family medical and workers' compensation files separate from the personnel file because, as I now see per policy, records are to be maintained for five years and then purged." He would have argued, he said, that it would be more cumbersome to selectively remove compensation documents over five years old from a personnel or medical file than to purge the entire contents of a compensation file. [Exh. RR-3.]

Risk Management Workers' Compensation Claims Supervisor Alan Hutchins testified that his unit handles compensation claims for the various city agencies, including the Department of Human Services. Risk Management maintains all information related to the claims in its database, and fields inquiries from supervisors or agencies about work restrictions and lost time. The City Attorney's Office obtains compensation documents needed for litigation purposes directly from Risk Management. Risk Management in turn obtains wage or job information from the agencies. Mr. Hutchins stated that there are three types of workers' compensation documents that are critical: those filed with the Colorado Division of Workers' Compensation, anything that documents the issues in dispute, and anything that proves the city's payment of medical bills and benefits.

Mr. Hutchins explained that agencies are not required to issue a clinic pass to an injured employee, and that all information on such a pass is duplicated elsewhere. The original is kept by the clinic. The employee's report of injury is usually filled out at the clinic, and faxed to Risk Management within two hours of the clinic visit. Information obtained from the fax is used by Risk Management to start the claim on its database, and the fax is not kept. Risk Management always sends agencies the return to work form listing work restrictions, as well as the final admission of liability. Statements indicating maximum medical improvement are not medical records, but are the basis upon which the final admission of liability is made. Documents stating a permanent disability rating are "not necessarily" sent to the agencies. On one occasion when Risk Management could not locate a file, it reconstructed the claim by obtaining copies of the injury report from the medical provider, and other documents from the Division of Workers' Compensation. [Testimony of Alan Hutchins.]

Mr. Hutchins learned recently that Risk Management has a policy that its files must be retained for 75 years, which permits the department to keep records for a period sufficient to cover any claims reopened during the lifetime of a claimant. Mr. Hutchins noted that Risk Management handles the claims and its own files according to the rules and statutes applicable to the workers' compensation field, but that agencies maintain compensation claim documents according to their own needs.

Assistant City Attorney Olivia L. Hudson Smith represents the city agencies in workers' compensation claims filed by their employees. She testified that she often obtains documents needed for litigation from the agencies' Human Resources units. Those documents include ones furnishing information on a claimant's use of family medical leave and other leave history, ergonomic assessments, return to work, the ADA process, and other relevant personnel records. Ms. Hudson also requests information on compensation claims directly from Risk Management. She confirmed that all compensation documents are eventually included in Risk Management's database.

2. Files stored in Appellant's office

Next, the Agency alleges that Appellant improperly failed to re-file fifty workers' compensation documents into the appropriate medical files, and left FML documents regarding four employees on the file room counter.

After Ms. Metoyer and Ms. DiMarco concluded that Appellant had attempted to shred critical Agency documents and placed him on investigative leave, they examined the documents found loose on Appellant's desk and cabinet. They compared them to the active case list, and eliminated all documents that were from still-open claims. Ms. DiMarco then created a log of the 54 remaining documents dating from 2004 to 2007. [Exhs. 11-11 to 11-12]. The disciplinary letter alleged that Appellant should have placed these documents in the unit's medical files.

Appellant responded that he was the sole HR analyst assigned to workers' compensation matters. He obtained all of his documents in workers' compensation cases from Risk Management, which maintained the official database on each claim. He did not get every document in every case, but kept those he received in open workers' compensation files in a cabinet in his office within file folders for each case. It was his practice to remove files from the cabinet once he received the Final Notice of Liability in each case from Risk Management, guided also by Risk Management's list of open cases. When a number of closed cases accumulated, Appellant would take them to the file room to sort. The documents in his cabinet all related to open claims, and it seemed more logical to Appellant to keep the claim files together in his office rather than file workers' compensation documents in the claimants' personnel or medical files. He was not directed to file workers' compensation documents in the file room with the medical files, or to use any particular filing system for his workers' compensation files. In his 12 years' experience, he could recall no instance where workers' compensation documents were retrieved from a medical file. Even after his files were purged, the

information contained in them was available on the STARS database and at Risk Management. [Exhs. RR-1 to RR-4.]

Appellant testified that the documents from closed cases found in his office were not filed in the file room because he needed to refer to them for a variety of reasons. He stored such documents in folders or loose in specific piles on the top of his cabinet. The Ocana and Casados documents on the Agency's log were from recently closed claims that Appellant removed from his cabinet in order to purge the files in conformity with his file management practice.

3. Response time to co-worker inquiries

The Agency alleged that Appellant failed to respond to phone calls and emails within 48 hours, as required by his performance standards. [Exh. 11-22.] The only specific example given was that Appellant did not contact an injured employee or follow up on supervisor Colleen Nieto's Dec. 27th request regarding the process for workplace injuries when her employee Pam Guhl fell down the stairs at work. [Exh. 12-5.]

Appellant responded that he it was his practice to tell any supervisor making such an inquiry that he would be in contact if there was anything else that needed to be done. He recalled a Friday meeting in December 2007 with an employee who had fallen on the job. The employee told him she felt fine and was not interested in going to the clinic. Appellant explained the procedure for going to the emergency room if her condition deteriorated over the weekend. Appellant stated that that there was no need to follow up with the supervisor, since the employee was not filing a claim. [Exh. RR-5.] He added during his testimony that he gave the employee a clinic pass before informing her that she could go to the emergency room over the weekend if needed.

The Agency presented no evidence rebutting Appellant's testimony that he contacted Ms. Guhl, or that Ms. Nieto asked Appellant to call him back after contacting her or "taking care of the paperwork." Without evidence that Appellant did not take some requested action within 48 hours of his conversation with Ms. Nieto, I cannot find that Appellant failed to meet the cited performance standard, or that he was negligent or careless in his duties.

4. Communication issues regarding compensation claims

Next, the disciplinary letter alleged that Appellant failed to communicate information about workers' compensation claims to employee relations specialists, also referred to as HR analysts, on two occasions.

a) Flores' work restrictions

The first instance cited by the Agency was that Appellant failed to share with the analyst a notice of claimant Elizabeth Flores' permanent work restrictions, which were contained in a Final Admission of Liability dated Dec. 20, 2007. Ms. Fairweather

testified that it was Appellant's duty as Agency Safety Representative to share with the other analysts information about employee restrictions arising from workers' compensation claims. The analyst then works with the city's Americans with Disabilities Act (ADA) coordinator, Rita Murphey, and the employee's supervisor to obtain the job specification and any other information needed to evaluate safety concerns and determine the appropriateness of the interactive process.

Appellant's written response states that he recalls asking Ms. Flores in December if she had any problems with the restrictions and her ability to do her job. She told Appellant she had no problem performing her job. "My understanding from conversations with Risk Management is that it is primarily the employee's responsibility to notify the agency if they cannot work within the restrictions which have been placed upon them. If they indicate they believe they cannot . . . then I would initiate the ADA process. Since Ms. Flores stated she could perform her job, "I saw no reason to initiate the ADA process." [Exhs. RR-5 to RR-7.]

Ms. Fairweather testified that the ADA and safety processes should not have ended there. She found that Appellant performed this job duty in a negligent manner, and that his failure to share information on the employee's permanent restrictions violated his established performance standards in the areas of teamwork and respect for others by depriving his co-workers of information needed to do their jobs.

b) Failure to respond to August email

The second example of communication issues was based on an email exchange in August 2007, in which the Agency claims Appellant did not respond in a timely manner, or gave an answer without researching the claim. In that exchange, Senior HR Professional Angela Williams asked Appellant to "see Judy Lujan in reference to Cindy DeLeon and her work station". Ms. Williams forwarded Ms. Lujan's message, which asked if Appellant could come to Ms. DeLeon's work area and provide her with more comfortable equipment. Five minutes later, Appellant responded by asking for any background. A few minutes after being told Ms. Williams had none, Appellant stated, "I do not think she is workers' comp. It does sound to me as if she is a potential family medical leave\ADA candidate." Ms. Williams responded that she would check her medical file. An hour later, Appellant responded that Ms. DeLeon did have a workers' compensation claim, and that he had visited her work station, did an ergonomic assessment, and made adjustments to her chair and keyboard. The exchange consumed a total of 90 minutes. [Exhs. 11-47 to 11-49.]

Appellant's written response to the disciplinary letter stated that he received the email request for information at 10:34 a.m. on Aug.9th, and initially responded at 10:41 a.m. that "I do not think she's workers' comp". He then verified through the STARS system that there was a claim, and sent a second response at 11:51 a.m. after he performed an ergonomic assessment. As a result, he gave the employee a different chair, instructed her on how to use it, and adjusted her keyboard. [Exh. RR-6.]

Ms. Williams testified that she began her employment with the city in June 2007 as the analyst in charge of FML issues. In August, she asked Appellant to see Ms. DeLeon to make adjustments to her workplace. In February 2008, Ms. DeLeon and her supervisor came to see Ms. Williams and asked whether she was eligible for FML leave for an unrelated health issue. Ms. Williams consulted the database and informed them that she was eligible for twelve weeks of FML leave. Ms. DeLeon corrected her, stating that she had already taken some FML leave in the spring of 2007. Ms. Williams was embarrassed by the inaccuracy of her FML records, and believed Appellant should have alerted her to the number of days of FML leave taken by Ms. DeLeon based on her compensation claims. In the spring of 2007, Renee Hernandez was the analyst assigned to handle FML issues. There was no evidence that Appellant was responsible for maintaining the accuracy of the information in the FML database after December 2006, when his FML duties were transferred to Ms. Hernandez.

Ms. Fairweather testified that Appellant provided inaccurate information to a co-worker by virtue of his first reply to the email, and therefore failed to meet his performance standards on teamwork and maintaining satisfactory work relationships.

5. Personal internet use

After concerns surfaced that Appellant was not returning phone calls, Ms. DiMarco requested a report of his internet usage from information technology services. That is done routinely when the adequacy and timeliness of an employee's performance came into question. The IT report showed that Appellant had clicked on 12,911 pages of the Colorado Public Radio website, and accessed www.google.com on 558 occasions from Nov. 8 to Dec. 24, 2007. Ms. Fairweather testified that IT personnel informed her it could not determine from the internet activity log whether Appellant was streaming radio broadcasts; i.e., listening to the radio while working or at lunch.

Appellant testified that he listened to Colorado Public Radio's classical music station while he worked during the day, and that other employees are permitted to listen to their own radios while they work. He stated he used Google as a part of his job to research ergonomic issues, especially the Occupational Safety and Health Administration (OSHA) website. Appellant stated he used the internet for personal use during his lunch hour and work breaks, and was not using it in support of a personal business. He was familiar with the Agency and city policies regulating internet use, and believed his use was consistent with both. The Agency presented no rebuttal evidence on this issue.

B. IMPOSITION OF PENALTY

The Agency's HR Director, Jennifer Fairweather, made the decision to terminate based on the recommendation of Appellant's supervisor, Ms. Metoyer, and her conclusion that Appellant's actions violated the following rules: 1) Appellant neglected his duty to maintain accurate records, follow up on customer requests, and handle the Flores ADA issue; 2) Appellant was careless in his destruction of records, and his failure

to assure that no FML documents were placed in the shredder; 3) Appellant misused city equipment by his excessive use of the internet; 4) Appellant failed to meet his performance standards by not responding to emails within 48 hours, and not informing the analyst of an employee's work restrictions for six days; 5) he failed to be a positive representative for the department by throwing away documents that others may need; 6) Appellant did not display teamwork by destroying documents, failing to share information, and breaking the trust of others in the unit; 7) he did not consider the ethical implications of his actions in attempting to destroy documents; 8) he failed to respect others by not sharing information, destroying documents, and his failure to maintain positive working relationships; 9) he did not maintain accurate records of his ergonomic duties, or share information within 48 hours; 10) Appellant violated the departmental retention schedule and internet policies; 11) he failed to maintain positive work relationships by not acting as a team member, failing to maintain accurate records, and failing to share needed information; 12) Appellant violated Executive Order 16 governing use of the internet; and 13) Appellant's destruction of documents, lack of customer service and poor information provided to others was prejudicial to the good order of the Department.

After considering Appellant's response and his work and disciplinary records, Ms. Fairweather terminated Appellant based in large part on her conclusion that he violated the Agency's document retention policy. She determined that Appellant made the decision to shred the documents without considering the Agency's function to maintain records for a variety of purposes, and that this continued a pattern of behavior in which Appellant acted based on his own interests, rather than those of the Agency. Ms. Fairweather also concluded that Appellant violated the rules cited in the disciplinary letter by his failure to re-file the documents in his office, failure to communicate with co-workers, and excessive internet use. Discipline less severe than termination was not considered because of Appellant's pattern of making unilateral decisions that were not in keeping with common practice as exercised by an HR professional with Appellant's level of experience in the field. Ms. Fairweather recalled that Appellant admitted he made a mistake in his handling of the documents, and expressed his regret for breaking the trust he had developed with his supervisor Ms. Metoyer by his ignorance of the retention policy.

Appellant's supervisor Juanita Metoyer recommended termination because she did not believe a suspension would result in a positive change in Appellant's behavior. She believed that a suspension would have a negative effect on the Agency's customer service role because of Appellant's poor communication with other employees.

Appellant's past disciplinary history from his hire date in 1996 is not extensive. He received a written reprimand in 2004 for providing inaccurate documentation to employees and failing to obtain information for his monthly reports. [Exh. 4.] In 2005, Appellant was verbally reprimanded for failing to use the in/out board appropriately, and given a written reprimand for four instances of rude or otherwise inappropriate communications with other employees.

III. ANALYSIS

A. Discipline under the Career Service Rules

In an appeal of a disciplinary action, the Agency has the burden to prove the action was taken in conformity with Rule 16 of the Career Service Rules, and that the degree of discipline was reasonably related to the seriousness of the offense, taking into consideration the employee's past record. CSR § 16-20.

1. Attempted destruction of Agency records

Discipline was imposed under a number of Career Service Rules based on the Agency's conclusion that Appellant intentionally attempted to destroy critical Agency records; specifically, 281 compensation and FML documents retrieved from several shredder bins. In support of this allegation, the Agency cited its record retention policy, which requires the destruction of case files containing client information after five years, with exceptions not relevant to this appeal.

The Agency established that on Dec. 24, 2007, Appellant placed a stack of Agency documents between two to four inches high into the shredder bin. A week later, the Agency emptied the other shredder bins, which were one-third's full, and added those documents to the eight-page "Log of Recovered Documents from Shredder Bin", later attached to the pre-disciplinary letter. Appellant admitted that he placed workers' compensation documents into one of the bins, but denied discarding any FML documents. He specifically denied attempting to shred some of the compensation documents on the log. The bins are emptied once a week. All staff, including one temporary employee, had access to the copy machine and shredder during the week between Dec. 24th and Dec. 31, 2007. Appellant was not responsible for FML issues and documents after December 2006, when that duty was transferred to Renee Hernandez.

The retention policy mandates the destruction by shredding of "all case files" after five years. The Agency presented no evidence that the documents in the bins constituted the entire case file in any compensation or FML matter. None of the documents on the log are over five years' old. The Agency did not rebut Appellant's testimony that the compensation documents were copies of those available at Risk Management, the department that had the duty to maintain the files on workers' compensation claims. It is undisputed that the Agency policy does not protect copies of documents already retained and available to the Agency. Moreover, when read in its totality, it is clear that the purpose of the policy is to require the destruction of client information after five years in order to protect the privacy and security of that information. Since it does not prohibit destruction of records, duplicate or otherwise, in advance of the retention schedule, the Agency's evidence did not establish that Appellant's attempt to shred documents violated the Privacy and Security Policy in any respect. Therefore, the allegation under CSR § 16-60 L. is not established.

During the hearing, the Agency also argued that Appellant violated its internal policy or practice prohibiting the destruction of documents critical to its operation, which includes advice to agencies on matters related to workers' compensation claims. There are three obstacles to this argument: First, the log lists an unspecified number of documents that were taken from other shredder bins, and the Agency did not identify which of the listed documents were taken from the bin used by Appellant. In fact, there is no evidence of the number of bins located in the copy room, or which documents on the log were pulled out of the bin used by Appellant. Second, there is no evidence that Appellant was informed orally or in writing that he could not discard his working copies of individual documents he no longer needed for his work in managing compensation claims. Third, the Agency did not rebut the testimony of Risk Management that it already had the information contained in the compensation documents. Since all of the listed compensation documents were also available through Risk Management, the Agency failed to establish that any of Appellant's copies were critical to the Agency's work. The Agency argued only that Appellant should not have discarded them because having them available at the Agency could expedite analysts' review of future issues if they become relevant. The evidence failed to show that Appellant had been instructed to maintain any of the documents, or that any were critical to its operations.

As to the FML documents found in the bins, the Agency did not establish that Appellant discarded all documents found in all bins it emptied on Dec. 24th and Dec. 31st. Since the entire staff had access to the bins during that period, and the Agency commingled the documents first recovered by Ms. Arter with the contents of all the other shredder bins, the Agency failed to prove by a preponderance of the evidence that Appellant discarded any specific document listed in the log.

The Agency next alleges through the testimony of Ms. Fairweather that Appellant's action constituted neglect of his duties to maintain accurate records and act to preserve the integrity of the department. In support, the Agency cited Appellant's Performance Enhancement Plan (PEP), which requires him to maintain "accurate records on liability, injuries and employee status." [Exh. 11-27.]

The evidence established that HR staff shared information as needed to work on their assigned issues, including discipline, pay, performance, compensation claims, use of FML and other leave, and ergonomic assessments. Files were kept in the locked file room, which was accessed by all staff. Loose documents were stored temporarily in a basket marked "file missing". Appellant maintained his workers' compensation files in his own office, and regularly discarded documents from closed files or those he believed he no longer needed. In making decisions to discard documents, he relied on his knowledge that he could access any information he may need in the future from Risk Management's STARS database. The Agency did not present evidence that Appellant was instructed to use a different method for storing files or information in order to maintain accurate records, or that it ordered him to keep for future reference all documents once he acquired them.

I find that the Agency failed to establish Appellant had a specific communicated duty not to discard any compensation documents. The Agency failed to prove that Appellant discarded any FML documents. There was no evidence that the loss of these documents rendered the remaining records maintained by Appellant inaccurate in any respect. Therefore, the Agency did not prove Appellant neglected his duty to maintain accurate records in violation of CSR § 16-60 A. For the same reasons, the Agency also failed to prove Appellant was careless in his duty to maintain accurate records on liability or injuries under CSR § 16-60 B.

Ms. Fairweather testified that Appellant's action in discarding the documents also violated his standard of performance to represent the department in a positive and professional manner under CSR § 16-60 K. The evidence in support of that allegation relied entirely on the Agency's finding that Appellant violated the Agency Privacy and Security Policy. Since I have found that Appellant did not violate that policy, the evidence fails to support that allegation. There is no evidence that Appellant took any action that represented the department in a negative light to others outside the department.

Likewise, the Agency presented no evidence that Appellant's purge of documents affected his PEP duties to internally share information under Section II, Teamwork, or to consider the ethical implications of his decisions under Accountability and Ethics. The Agency did not prove Appellant's actions failed to respect others or that they inhibited his ability to perform his duties. Because the Agency failed to meet its burden to prove a violation of the privacy policy or any standard of performance, there is no evidence to support a finding that Appellant violated § 16-60 K.

While not specifically argued, the disciplinary letter can also be interpreted to allege that Appellant's use of the shredder under these circumstances was unauthorized, in violation of CSR § 16-60 D. There was no evidence that employees were given notice that use of the shredder on individual Agency documents would subject them to disciplinary actions. In fact, the document retention policy mandates destruction by shredding for client files. [Exh. 11-39.] I find that the Agency did not prove Appellant's use of the shredder was a violation of § 16-60 D.

The Agency also alleged that Appellant's attempted destruction of documents was prejudicial to the good order and effectiveness of the department, and caused misdirection of other employees under CSR § 16-60 Z. However, there was no evidence that any document actually added to the shredder bin by Appellant was necessary in any respect to the work of the department, or that their eventual destruction would have been prejudicial to the Agency. As to one document specifically noted by the Agency, all five carbon copies of Ben Levek's Employee Work Injury Report were found in the bin, leading the Agency to conclude that there was no record of that workers' compensation claim. [Exh. 11-17.] Appellant testified that he was personally familiar with that employee's claim based on a motorcycle accident, and that the claim had been filed and handled by Risk Management. Appellant noted that some forms are duplicates or not used, and that it was his practice to discard such forms. The

Agency did not rebut this more specific evidence. I find that the Agency failed to prove that Appellant's action prejudiced the Agency's good order and effectiveness in violation of § 16-50 Z.

2. Files found in Appellant's office

The disciplinary letter next alleged that Appellant failed to re-file 54 documents into the office's personnel or medical files, and that this violated both his duty to maintain accurate records and to share information with his co-workers, as required by his PEP standards of performance. In support, the Agency presented then-Deputy Manager Kevin Patterson's 2005 response to Appellant's grievance of a written reprimand. In that response, Mr. Patterson instructed Appellant not to use clerical staff to handle his paperwork. [Exh. 9.] Ms. Fairweather testified that Appellant's failure to re-file the documents demonstrated his pattern of failing to share information with other staff "to ensure effective and efficient communication regarding risk management issues." [Exh. 12-2.] Ms. Fairweather also concluded that Appellant's display of the client information on his desk and cabinet failed to secure the claimants' confidentiality.

The Agency did not present any evidence that its HR employees were prohibited from or advised against having client documents on their desks from one day to the next. While maintenance of a locked file room for medical files indicates that client confidentiality is an important Agency value, Appellant's PEP does not contain a performance standard on client confidentiality or the prompt re-filing of employee documents. Moreover, there was no evidence that Appellant had been instructed not to keep loose documents in his office, or ordered to re-file documents within a certain time period. The Agency presented no evidence that Appellant's in-office use of the documents was inconsistent with the working practice within the unit. Therefore, I cannot find that Appellant neglected his duty, was careless, or failed to meet performance standards by failing to re-file the 54 documents listed on the Agency log. The Agency did not allege that Appellant's failure to file these documents in the unit's medical files violated any policy or Career Service Rule, and no such violation is supported by the evidence. I conclude that Appellant's maintenance of those documents in his office did not support the imposition of discipline.

The Agency also asserted that FML files containing medical information for employees Saitta, Ackland and Harris were found on the file room counter top. Appellant had no current responsibility for FML issues at the time of his termination, as that duty had been reassigned to another employee, Renee Hernandez, in December 2006. [Exh. RR-3.] The Agency presented no evidence connecting Appellant to the placement of those files in the file room.

3. Response time to co-worker inquiries

The Agency asserts that Appellant failed to respond to a supervisor who inquired about an employee's injury. Appellant testified that he would have followed his standard practice upon receiving a report of a workplace injury, which was to inform reporting

supervisors that he would contact them after he spoke with the employee if they needed to take any action. He would then contact the employee to discuss the injury. If the employee decided not to file a claim, Appellant did not contact the supervisor a second time to relay this information. He developed this approach to reports of workplace injuries as a part of the 2007 strategic plan in order to reduce the rate of supervisors' failure to submit a report of injury. Appellant stated that this new procedure reduced claims by 10% for that year. [Exhs. RR-4 to RR-5.]

The Agency did not present any testimony rebutting Appellant's statements as to either his usual procedure or his conversations with Ms. Nieto or Ms. Guhl. The testimony at hearing added no other instance where Appellant failed to meet the established response time for inquiries. The evidence fails to demonstrate that Appellant did not respond to that or other inquiries within 48 hours, as required by the established standards of performance for Appellant's position. [Exh. 11-22.]

4. Communication issues on compensation claims

a) Flores' work restrictions

Negligence is established by proof that an employee had an important work duty and failed to perform that duty, resulting in significant potential or actual harm. In re Dessureau, CSA 59-07, 4 (1/16/08). Here, the Agency proved that Appellant neglected an important safety duty by failing to share information about a claimant's permanent work restrictions with the analyst. Appellant failed to communicate this information from Dec. 20, 2007, the date he received the Final Admission of Liability, to Jan. 7, 2008, the date he was placed on investigative leave. His failure to communicate the employee's restrictions in accordance with Agency safety and ADA procedures could have affected the employee's safety, the employer's ability to obtain needed work from the employee, and the city's liability for exacerbation of her injuries. In addition, Appellant's inaction impacted his co-workers' ability to perform their duties to determine the appropriateness of the interactive process and evaluate safety concerns in a timely manner.

Appellant's testimony indicates that he believed the Agency was critical of his decision not to refer the claimant to the interactive process under the ADA. Appellant did not rebut the Agency's evidence that he failed to communicate the claimant's work restrictions from the Final Admission of Liability to other employees with responsibility to determine safety and ADA issues based on those restrictions. I find that Appellant's failure to communicate the claimant's work restrictions constituted neglect of his duties as safety representative and coordinator of workers' compensation claims for the Agency, in violation of § 16-60 A.

For purposes of CSR § 16-60 K, established performance standards may be found in a performance evaluation. In re Dessureau, supra, at 7. The relevant performance standards for teamwork in Appellant's PEP require 80 – 90% of Appellant's co-workers to rate him as having a positive contribution to team performance, morale and working relationships. [Exh. 11-23.] As it is phrased, that

standard of performance for teamwork is not violated by a single instance of failing to communicate needed information to a co-worker. Likewise, the standards set in the category of Respect for Self and Others were not violated by Appellant's action in failing to communicate this information to his co-workers. [Exh. 11-25.]

Appellant's failure to impart the employee's restrictions to the assigned analyst did violate his standards of performance as to his job duties in that he failed to interact with analysts "to ensure effective and efficient communication regarding risk management issues", and to provide "all involved staff with information within 40 hours of event requiring notice." [Exh. 11-27.] Therefore, the Agency proved Appellant's inaction violated CSR § 16-60 K.

The Agency presented no evidence that Appellant's failure to act negatively affected either his relationship with any co-workers, or the good order of the Agency. Therefore, I find that his action did not establish a violation under either CSR § 16-60 O or Z.

b) Failure to respond to August email

The disciplinary letter stated substantially different reasons for its finding of misconduct than those stated by the co-worker who raised the issue to the Agency. Ms. Williams did not initially complain about Appellant's response to her email request. Instead, Ms. Williams testified that she believed Appellant caused her embarrassment in Feb. 2008 by not informing her in August 2007 of Ms. DeLeon's FML leave history. Since Appellant was not the analyst assigned to FML issues during that period, and Ms. Williams did not ask Appellant for that information, I find Appellant was not negligent in failing to communicate that information to her, if in fact he had knowledge of that leave. More importantly, the Agency did not base its discipline on Appellant's failure to give information about the employee's FML leave to Ms. Williams.

Instead, discipline was imposed based on Ms. Fairweather's conclusion that Appellant did not respond in a timely manner to Ms. Williams as to whether the employee had a compensation claim. An examination of the email establishes that Ms. Williams did not ask Appellant that question. Appellant volunteered his belief that the employee did not have a claim, but corrected his statement within the hour.

The disciplinary letter also alleged that Appellant answered the inquiry without researching the claim. Since Ms. Williams did not ask Appellant if the employee was a claimant, the fact that Appellant volunteered the information, then almost immediately corrected it, is not proof that Appellant was negligent or careless in performing his duties. The Agency also failed to prove Appellant did not meet his performance standard on teamwork, or that he violated the rule requiring the maintenance of satisfactory work relationships, in accordance with CSR §§ 16-60 K or O.

5. Personal use of internet

Executive Order 16 defines permissible use of the internet as use that is “limited, occasional, or incidental . . . for personal, non-business purposes . . . so long as it is of a reasonable duration and frequency, does not interfere with the employee’s performance of job duties, and is not in support of a personal business.” The Agency’s internet policy similarly defines permissible use, adding only that such use may not violate any laws or regulations. [Exhs. 11-47 to 11-48, DHS Privacy and Security Manual, Internet Use, effective May 21, 2007.]

Appellant was disciplined based in part on the Agency’s determination that he engaged in excessive use of the internet while at work, including accessing Colorado Public Radio’s website and Google. Appellant testified that he listened to classical music while working, and that he used Google to research matters related to his duty to perform ergonomic assessments. The Agency did not rebut that evidence. I find the Agency failed to establish a violation of Executive Order 16 by a preponderance of the evidence.

B. Appropriateness of Penalty

The Agency established that Appellant violated §§ 16-60 A and K by neglecting to communicate a claimant’s work restrictions to the appropriate analysts and other personnel. The Agency failed to prove the other four allegations included in the disciplinary letter. The Agency based its termination decision in large measure on its finding that Appellant discarded critical Agency documents in violation of its retention policy. There was no evidence as to the penalty that would have been imposed if the Agency had found that only this allegation had been proven.

The Agency reasoned that suspension or other lesser discipline was not appropriate because the attempted destruction of the documents demonstrated Appellant’s willful continuation of a pattern of behavior in which he disregarded Agency practice and acted in his own interests. Ms. Metoyer testified that she believed Appellant was incapable of changing his behavior. No Agency witness explained why they disregarded Appellant’s previous improvements to his performance after it was criticized, or discounted his apology for his ignorance of the retention policy. I conclude that termination is inappropriate given the Agency’s failure to prove the majority of the contentions made by the disciplinary letter, in particular the allegation that Appellant destroyed critical Agency documents.

The purpose of discipline is to correct inappropriate behavior or performance. CSR § 16-20. “Whenever practicable, discipline should be progressive.” Appellant’s last disciplinary action was a 2005 written reprimand. “In order of increasing severity”, the next level is a suspension or involuntary temporary reduction of pay. § 16-50. Discipline depends on the seriousness of the offense, and must be “reasonably related to the seriousness of the offense.” Since the type and amount of discipline must be calibrated to what is considered necessary “to correct the situation and achieve the

desired behavior or performance" under CSR§ 16-20, the level of discipline issued here must be reduced to consider only the offenses proven by the Agency.

The Agency proved one of two instances in which Appellant failed to transmit workers' compensation information to other employees. However, that inaction was a serious one in which Appellant demonstrated neglect of his primary duty to serve as a conduit between Risk Management and the Agency in order to minimize potential liability for the city. His failure to communicate the claimant's permanent restrictions could have led to personnel issues over improper work assignments, or an otherwise avoidable re-injury. Moreover, Appellant believed the issue raised was that he resolved the ADA issue by talking to the employee, and relying on her statement that she had no problem doing her job. Ms. Fairweather correctly concluded that the safety and reasonable accommodation issues should have been referred to the employees whose job it was to evaluate those issues. Appellant's testimony about his usual practice on receiving work restrictions, and his failure to consult with the Agency's specialists in these areas, indicates a misunderstanding of the nature and importance of these significant duties.

In mitigation of Appellant's oversight, Appellant received his training to perform his worker's compensation duties on the job, from his interaction with Risk Management. The Agency presented no evidence that Appellant would not correct his performance of these tasks after further training or instruction. Appellant demonstrated a willingness to improve his performance in order to better serve the Agency's customers, and took pride in his role as an experienced instructor at the University of Phoenix on a number of subjects in the human resources field. The Agency did not rebut Appellant's testimony that his past performance evaluations all rated him at a satisfactory or higher level. The Agency failed to support its conclusion that Appellant was incapable of improving his performance to meet its standards.

In light of all the evidence and Appellant's past disciplinary and work record, I find that a one-week suspension and any performance improvement plan deemed necessary by the Agency based on the proven performance issues is an appropriate penalty for the violations under CSR §§ 16-60 A and K.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency termination dated Feb. 4, 2008 is MODIFIED to a one-week suspension and any performance improvement plan deemed necessary based on the proven violations.

Done this 14th day of July, 2008.


Valerie McNaughton
Career Service Hearing Officer