HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 35-08

DECISION

IN THE MATTER OF THE APPEAL OF:

SHERI CATALINA, 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 July 16, 2008 before Hearing Officer Valerie McNaughton. Appellant Sheri Catalina was present and represented by Michael O'Malley, Esq. The Agency was represented by Assistant City Attorney Niels Loechell, and its advisory witness was LaTunya Savage. 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. STATEMENT OF THE CASE

Appellant Sheri Catalina held the position of Administrative Support Assistant III (ASA III) with the Denver Department of Human Services (Agency) on the date of her termination, April 23, 2008. Appellant filed a timely appeal of the action on May 2, 2008 pursuant to the jurisdiction provided in the Career Service Rules (CSR) § 19-10 A. 1. a.

The Agency's Exhibits 3 - 5, 7 - 9, 12 and 13 and Appellant's Exhibit A were admitted by stipulation of the parties. The Agency withdrew its exhibits 10 and 11 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 for the violations proven by the Agency?

III. FINDINGS OF FACT

Appellant was employed with the Agency for thirteen years. At the time of her termination, she was assigned as an ASA III to the Department of Human Services' Families and Children Division. As a part of her duties, Appellant had access to highly confidential information regarding reports of child abuse. The employee handbook prohibits employees from accessing or using that information for any non-business purpose. [Exh. 5-3] That policy was reinforced in the Sept. 2007 Privacy and Security Manual, which limits business use to that "reasonably needed to perform a specific function". [Exh. 8-9.] At the time of her hire in 1995, and again in 1998, Appellant acknowledged her understanding of the Agency's policies prohibiting employees from requesting Agency information for their own personal use. [Exh. 13.]

In October 2007, Appellant and her husband began divorce proceedings. On Feb. 22, 2008, Appellant consulted with an attorney, J.M.[1], in order to obtain representation in the divorce action. At the end of the two-hour consultation, J.M. stated he had a client who was named as the perpetrator in a sexual assault report. His client was frustrated because he was unable to prosecute the informant for what he believed was malicious filing of the abuse complaint.[2] J.M. offered to waive his $400 consultation fee if Appellant would research and disclose the name of the informant in that report, which J.M. stated was filed with the Agency's Child Protection Services section.

On Feb. 27, 2008, J.M. phoned Appellant and asked again for the information. Appellant looked up the case in the Agency's computerized database, known as TRAILS. She told her co-worker and friend, Veronica Newland, that her attorney had offered to waive his consultation fee if she would reveal the name of a reporting party in a child abuse case. Ms. Newland advised her not to provide the information. Appellant agreed that she should not do it, but stated she was worried about how she would pay the fee if she did not accept the offer. Appellant and Ms. Newland had discussed her divorce case as friends since the divorce commenced in September.

The next day, J.M. called Appellant again, and repeated his request for the name of the reporting party. Appellant made an appointment with him for March 3rd to continue preparation in the divorce matter. Later that day, Appellant went to the F.A.S.T. unit, where closed files were stored, and requested the case file by using her own name and the line index number of the social case worker assigned to the matter. Appellant then asked co-employee Kim Burkhart to copy the file for her,

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[1] The name of the attorney is the subject of a protective order based on the privacy needs of parties to a child protection investigation. The protective order also prohibits any identifying information on the informant in the child abuse report.

[2] Colorado law protects the identity of a person who reports child abuse based upon the legislative declaration of the sensitive nature of the information and its impact on the privacy of children and their families. C.R.S. 19-1-307(1)(a); 19-1-302.

without revealing the reason for her request. Appellant took the fifteen pages of copies to her desk to read. Appellant showed the two-page child abuse report containing the name of the reporting party to Ms. Newland, whose desk was next to hers. Appellant told her that she had asked Ms. Burkhart to make the copies. They both reacted with shock to the identity of the reporting party. They agreed that it was "scary" that they were reading the sex abuse file, and thought that revealing the name could tear the family apart. Appellant again expressed concern about paying the attorney on the one hand, and losing her job if she instead chose to disclose the information to him. Ms. Newland advised her not to reveal information from the file to the attorney. [Testimony of Appellant, Ms. Newland.]

On Friday, Feb. 29th, Appellant told Ms. Newland that she had thought about it all night, and that it had made her sick. She stated she decided she could not give the attorney the information he wanted. [Testimony of Ms. Newland; Exh. 4.] That day, Appellant placed the copies of the file in the shredder bin next to her desk, and placed the file in the buggy for return to the F.A.S.T. unit. At about eight o'clock P.M., after she thought the attorney would have left his office, she left him a message in which she declined to provide the information and asked him to bill her for his time. She was so nervous about the conversation that she wrote it out verbatim before making the call, and kept the script. [Exh. A.]

On March 12th, Appellant and her supervisor LeTunya Savage were talking about the issues arising from her divorce. Appellant mentioned that she fired her first attorney because he had asked her to look up information in a child sex assault investigation in return for waiving his $400 fee. She told Ms. Savage that she looked up the information in the TRAILS computer system, but decided not to convey it to her attorney after talking to her mother and concluding that it could both jeopardize her job and cause problems in the family involved in the child abuse matter. [Testimony of Ms. Savage.]

The next day, Ms. Newland told Ms. Savage that Appellant had asked Ms. Burkhart to copy the investigative file for her. Ms. Savage located the F.A.S.T. log, which showed that Appellant used another employee's line index number to check out the file from the F.A.S.T. unit. Ms. Savage then questioned Ms. Burkhart, who confirmed that Appellant had asked her to copy the file. Ms. Savage reported this information to Manager Allen Pollack, who initiated disciplinary proceedings against Appellant. [Testimony of Ms. Savage.]

Senior Human Resources Professional Angela Williams conducted the investigation into this matter. She found that the sexual assault case had been inactive since 2006, but that Appellant used the social case worker's number without her knowledge to obtain the file from the F.A.S.T. unit.

Appellant submitted a written statement during the pre-disciplinary meeting held on April 18, 2008. [Exh. 4.] Appellant admitted in the statement that "[p]rior to making my decision not to disclose the information, I did indeed look up the

information in TRAILS and check out the case jacket from closed files. I asked a co-worker to copy the file for me, since I was busy with my daily duties." [Exh. 4-1.] She admitted discussing the information found in the file with Ms. Newland "because I was uncomfortable and needed to confide in someone." Appellant stated she used another employee's line index number because she could not remember her own number.

> I realized what [the attorney] asked of me was unethical and would jeopardize my career. I am currently involved in a divorce and child custody battle. While this is not an excuse, it has affected me personally. When the attorney asked me for the information, it caught me off guard and I may have agreed to something that I later realized was against the law, unethical and not in my best interest.

[Exh. 4-2, Appellant's statement dated April 18, 2008.]

The Agency's employee handbook stresses confidentiality of client data in many sections. "The privacy of DHS clients . . . must be respected at all times. State law requires that any information regarding clients . . . stored in any form (hard copy, computer or microfiche) is confidential and may be made available only to employee in the line of duty and to others only in response to a subpoena. In other words, any client or employee information that you come into contact with while doing your job is confidential. You may not disclose it verbally, via email or in any other form to anyone except as part of doing your job." [Exh. 5-3, excerpt from DHS Employee Handbook – Code of Confidentiality.] "Information acquired by employees in the course of their employment will be used and/or divulged to others only for appropriate purposes associated with their assigned duties." [Exh. 5-4, excerpt from Denver County Department of Human Services Fraud Prevention / Quality Improvement Manual, § 1.3.] Colorado law protects the identity of persons reporting child abuse by punishing a violation as a class 2 petty offense. C.R.S. 19-1-307(1)(c).

The above policies were reinforced by the Agency's Privacy and Security Manual, and extensive mandatory employee training on that policy in the fall of 2007. [Exhs. 8, 9.] The manual "complies with Federal and State laws and regulations requiring the protection of information, and attempts to coordinate all legal requirements the Department must meet in order to provide a comprehensive set of policies and procedures for Department workforce members to follow." The manual declared that the protection of client data and the privacy of recipients of public benefits "is a public trust" that is the responsibility of all members of the Agency workforce. [Exh. 8-3.] Employees "will take all reasonable steps to ensure that only the minimum amount of protected client information necessary to accomplish the specific purpose of a use or disclosure is actually used or disclosed." [Exh. 8-9.] The manual notifies employees that violations of the policy "may result in discipline based upon Career Service Rules." [Exh. 8-3.]

Since employees are permitted to access client information by mere use of their names and access codes, without proof of a business reason for the information requested, the Agency must rely on its employees' strict compliance with its confidentiality policies. During the September 2007 training attended by Appellant, Trainer Julie Spence Prine emphasized that compliance with clients' privacy rights avoids possible financial sanctions and criminal penalties, and that employees may not disclose the identity of a person reporting child abuse absent a court order. [Exhs. 9-5, 9-12.]

Mr. Pollack made the final disciplinary decision in this case. He found that Appellant admitted she breached the Agency's policy on confidentiality by accessing, copying, reading and sharing a report of child sexual abuse. He believed based on the facts presented at the meeting that she initially intended to disclose the name of the reporting party to her attorney in exchange for a monetary benefit, and that she improperly involved another employee by asking her to copy the file. As to the allegations made in the disciplinary letter, Mr. Pollack found that Appellant neglected her duty by accessing confidential information, used her official position for personal advantage in violation of CSR § 16-60 F, and failed to meet her established standards of performance as to service, teamwork, accountability, and respect for others. Mr. Pollack found that Appellant violated the above Agency policies, and that her conduct was prejudicial to the good order and effectiveness of the Agency, in violation of § 16-60 Z.

After reviewing Appellant's personnel file, Mr. Pollack determined that there were no major red flags in her performance, as she had received "meets expectations" evaluations for the past two years. Her disciplinary history was confined to a single reprimand issued nine years ago, and therefore he did not consider her past disciplinary action as an aggravating factor. [Exh. 5-6.] He considered the pressure imposed on Appellant by her attorney, but found that the importance of the Agency's core value to protect client confidentiality should have weighed heavier on Appellant than that pressure. As a result of her actions, Mr. Pollack found that Appellant destroyed the trust placed in her by the Agency. Since "all workers have access to personally identifiable information or some other confidential information" [Exh. 8-5], Mr. Pollack did not consider a transfer or demotion to another position as a viable lesser penalty. Given the seriousness of the misconduct in the context of the Agency's central mission, he concluded that the only appropriate discipline was termination.

IV. ANALYSIS

1. 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.

The Agency asserts that Appellant's actions in accessing and using confidential client information violated its policies, Appellant's performance standards, and a number of Career Service Rules. The first issue to be determined is whether Appellant's actions from Feb. 22nd to March 12th violated the Agency's policies on the use of confidential information maintained by the Agency.

a) Agency confidentiality policies

Appellant does not dispute that she accessed the Agency's computer database in response to her attorney's offer to waive his fee if she disclosed the reporting party in a child sexual abuse complaint. Appellant admits later obtaining the paper file by using another employee's line index number. She also concedes that she asked Ms. Burkhart to copy the file, and read the investigative report, which revealed the name of the reporting party. Appellant testified that she shared that report with her co-worker, Veronica Newland, and that neither of them did so as a part of their duties.

Appellant testified that she obtained the information out of curiosity, and never intended to reveal the name of the reporting party to her attorney. This is contradicted by her earlier statements. On March 12, 2008, Appellant told her supervisor that she thought about giving the information to the attorney, but decided not to after speaking with her mother about the issue. [Exh. 5-5.] On April 18, 2008, Appellant submitted a two-page response to the pre-disciplinary letter in which she admitted that she decided not to disclose the party's name on Feb. 28th, and that she checked out the case jacket before she made that decision. [Exh. 4.]

In addition to Appellant's previous statements, circumstances also indicate that Appellant intended to use this highly sensitive information to obtain a financial advantage. A full week elapsed between the attorney's request and Appellant's decision not to disclose the name of the reporting party. During that time, Appellant used another employee's line index number to check out the case jacket from archives. Appellant asked Ms. Burkhart to copy the file rather than doing it herself. She twice discussed her quandary with Ms. Newland, and improperly shared the confidential report with her. She set another appointment with the attorney, an indication that she intended to continue their attorney/client relationship. Appellant did not inform her supervisor about her breach of the security policy until two weeks after it occurred, and then failed to disclose the full extent of that breach: that she obtained the file with another employee's access number, asked a second employee to make a copy of the file, and read and shared the information with a third employee. Together, this chain of events leads to the conclusion that Appellant intended to conceal her actions in order to allow her to use the information for her own purposes without discovery. "At no time did I feel comfortable with what I was doing." [Exh. 4-1.] Appellant obtained the information with full knowledge that she

was violating Agency policy, and with the present intent to do so. That she ultimately decided not to disclose the information does not render her previous actions blameless.

At hearing, Appellant argued that she acted under great pressure from her attorney, and that the divorce left her unable to think straight. The only evidence directly in support of this argument is that the attorney made two phone calls over the course of a week in which he asked her to disclose the name of the reporting party. Appellant testified that she got the file to satisfy her curiosity, rather than in response to the attorney's repeated requests. The divorce action had been ongoing for about five months at the time of the incident, with no evidence that her stress was any greater in February than it had been throughout that period. Moreover, Appellant first accessed the information right after the attorney's first phone call. [Testimony of Appellant; Ms. Newland.] Once Appellant spoke to her mother about the choice she was facing, Appellant rationally determined that the promised financial benefit was not worth the loss of her job and consequences to the family involved in the assault complaint. A week after the offer was made, Appellant declined, and severed the attorney/client relationship. I find that the attorney's requests did not compel Appellant to reveal the confidential information. I conclude that Appellant's intentional actions in accessing and sharing confidential information in an investigative file violated the Agency's confidentiality policy. The Agency therefore established that Appellant's conduct violated CSR § 16-60 L, Failure to observe written departmental or agency regulations, policies or rules.

b) Neglect of duty

The Agency contends that Appellant's actions constituted neglect of duty in violation of CSR § 16-60 A. Neglect of duty requires proof that an employee has an important work duty and failed to perform that duty, resulting in significant potential or actual harm. In re Sienkiewicz, CSA 10-08, 15 (7/14/08).

As found above, the evidence demonstrated that Appellant's duties included preserving the security and confidentiality of client information, and that this duty was an important part of her functions. Appellant's actions in accessing and sharing the identity of a person who reported child abuse constituted a neglect of her duty to protect the privacy of clients. As a result of these actions, the identity of the reporting party was revealed to Appellant and Ms. Newland. Under Colorado law, the name of an informant in a child abuse matter is protected from disclosure by the criminal law, in keeping with the legislative recognition of the "impact on the privacy of children and members of their families" of such disclosure. C.R.S. 19-1-302(1)(a). This disclosure of the informant's identity and exposure to criminal liability proved that Appellant's conduct caused significant harm within the meaning of the rule. Therefore, I find that the Agency established that Appellant neglected her duty to protect that information from disclosure as a result of her proven actions.

c) Using official position for personal advantage

Mr. Pollack also found that Appellant used her status as an employee for personal advantage: the waiver of a $400 debt for professional legal services that she would have owed if she had not provided the confidential information requested by the attorney. Mr. Pollack testified that there was no way of knowing whether Appellant actually communicated the requested information to the attorney, but that he believed she intended to disclose it. Both Appellant and the attorney denied that she conveyed the name of the informant to him. Appellant's script of her voice mail message provides contemporaneous evidence supporting this denial. [Exh. A.] J.M. corroborated this by his testimony that Appellant initially said she would look into it and give him a call, but then phoned him later to state "she was not going to be able to help at all." Ms. Savage confirmed Appellant's testimony that she did not disclose the information. Ms. Savage related that Appellant volunteered her admissions about the encounter even before the issue of discipline arose. [Exh. 5-5, testimony of Ms. Savage.]

On the basis of this evidence, I find that the Agency did not establish by a preponderance of the evidence that Appellant actually conveyed the information to the attorney, or that she profited from cancellation of the debt. Since the rule requires proof of actual use of an official position for personal gain, the Agency failed to prove a violation of § 16-60 F.

d) Conduct prejudicial to good order of Agency

The Agency concluded that Appellant's conduct also violated CSR § 16-60 Z. The first part of this rule requires proof of conduct that hinders an agency's ability to perform its mission. In re Strasser, CSA 44-07, 4 (10/16/07) affirmed CSB 2/29/08. Since the Agency did not prove it was prevented in any significant respect from maintaining the confidentiality of its records by Appellant's conduct, no violation of this part of the rule was established.

The second part of the rule prohibits conduct that actually injures the City's reputation or integrity. Id. There was no persuasive evidence that Appellant's brief consideration of her attorney's request became known to others outside the Agency, or otherwise injured the City's reputation or integrity. In fact, its prompt enforcement of the confidentiality policies by Appellant's termination amply reinforced its commitment to the principles announced in those policies to anyone who learned of these events. Therefore, the Agency failed to prove a violation of any part of § 16-60 Z.

e) Violation of standards of performance

Mr. Pollack found that Appellant violated § 16-60 K. by failing to meet the following performance standards from her PEP/STARS annual performance plan:

1. Service, which requires Appellant to "keep information confidential. Confidential, client, customer or employee information will only be shared on a 'need to know' basis".

2. Teamwork: "Acts to build mutual trust and cohesion among the team members."

3. Accountability and Ethics:
a. "Ensures sensitive, proprietary, and client personal information remains confidential.
b. Follows the performance and conduct standards for the section, and ensures that the essential duties and responsibility of your job are fulfilled in an acceptable manner. . .
c. If a problem arises, communicates it immediately to immediate supervisor.
d. Considers ethical implications of decisions."

Standards:
- Follows the spirit and the letter of the Ethics Code, Career Service Rules, and Departmental policy, and seeks clarification as needed.
- Considers likely outcomes, his/her own duty/obligation, the rights of others and the reputation of the City when choosing a course of action.
- Acts in a manner that promotes a positive image for the City and County of Denver. . .
- Is perceived as being ethical, honest and fair by peers, subordinates, supervisors, customers.

4. Respect for self and others:
1. Conduct yourself in a manner that respects your co-workers and helps to maintain a positive work environment. [Exh. 5-1, 5-2.]

The Agency established that Appellant violated her performance standard on service by improperly obtaining and sharing confidential client information with Ms. Newland. A single infraction of this essential standard proves a violation, given the Agency's mission and its need to give its employees quick access to confidential information to do their jobs.

As to teamwork, Appellant involved three different employees in her efforts to access the information requested by her attorney: the social worker whose access code she used to obtain the case file, Ms. Burkhart, from whom she requested copies of the file, and Ms. Newland, with whom she shared the contents of the file. Appellant then failed to follow the new procedure requiring the report of any security incidents to the Privacy Officer. [Exh. 8-5.] She also gave an incomplete report to her supervisor of the extent of the breach by not disclosing that she checked the file out, asked Ms. Burkhart to copy it, read the report, and showed it to Ms. Newland. This course of action by its nature undermined trust among unit employees, and violated the teamwork performance standard.

The first standard on accountability and ethics required Appellant to ensure the confidentiality of client personal information. Appellant failed to meet that standard when she accessed the name of the informant in a child sexual abuse case, in violation of state law and Agency policy, then shared that highly sensitive information with another employee. Both recognized that looking at the report was "scary"; i.e., unusual and potentially dangerous. Appellant told Ms. Newland she was so upset by the situation that she was sick the previous night, before she decided not to disclose the informant's name. One incident of this magnitude with potential legal consequences violates this important standard of performance.

In addition, Appellant's failure to inform her supervisor immediately and completely of this breach of confidentiality violated the sixth subsection under the accountability standard. The Agency did not establish that Appellant violated the remaining two subsections of this standard, or that her actions violated the general statements included below the accountability standard as bullet points.

Finally, the Agency claims that Appellant's involvement of three other employees in her ethical dilemma violated the performance standard of maintaining respect for others and helping to maintain a positive work environment. I find that the standard does not give notice to a reasonable employee that confidentiality breaches are covered by that standard, given their specific coverage in other standards of performance. See In re Mounjim, CSA 87-07, 14 (7/10/08).

The Agency proved that Appellant failed to meet her performance standards on service, teamwork, and accountability, in violation of § 16-60 K.

2. Appropriateness of Penalty

The final issue is whether dismissal was an appropriate penalty given all the facts, including the nature of the proven misconduct and Appellant's performance and disciplinary history.

The Agency acknowledged that Appellant had no discipline that could reasonably be considered in aggravation on the issue of punishment, having only a single reprimand nine years ago. Mr. Pollack reviewed Appellant's personnel file, and noted that her performance had been rated satisfactory for the past two years. However, he took into consideration the importance of the confidentiality policy to the Agency's mission, as indicated by recent and extensive mandatory training devoted to the subject, and the legal consequences to the Agency of employee non-compliance. He found that Appellant's actions showed an intention to violate the policy by accepting the attorney's offer to trade information for a monetary benefit. She involved two other employees in her efforts to obtain that information. Appellant read the report and shared it with another employee. Thereafter, Appellant changed her mind about disclosing the information to the attorney, but did not inform her supervisor of the security breach until March 12th. Under those circumstances, Mr. Pollack determined that Appellant had destroyed the trust needed for her to do her

job, which required her to have access to client information, and that termination was therefore the only appropriate penalty.

Appellant argues that dismissal is too severe based on her clear disciplinary record, the pressure placed on Appellant by her attorney as well as her divorce, Appellant's attempt to disclose her misconduct to Ms. Savage on March 12th, and her eventual decision not to share the information.

"The corrective purpose of discipline is fulfilled when an agency tailors the penalty to the nature and circumstances of the misconduct and the employee's past disciplinary history." In re Rogers, CSA 57-07, 7 (3/18/08). The context of Appellant's actions is important in determining the level of discipline that could be imposed by a reasonable administrator. Here, Appellant works in an agency entrusted to protect children and investigate allegations of sexual and other abuse. Appellant's attorney sought to learn the identity of an informant in a child sex abuse case for the stated purpose of prosecuting the informant for malicious filing of the complaint. Appellant took several substantial steps toward providing that information over several days before deciding not to disclose it. In this context, I cannot find that termination was an unreasonable level of discipline for the proven violations of the rules.

Order

Based on the foregoing findings of fact and conclusions of law, it is determined that the Agency's action dated April 23, 2008 is AFFIRMED.

Done this 22nd day of August, 2008.

Valerie McNaughton
Career Service Hearing Officer