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

Appeal Nos. 130-02 & 85-02

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

PHILLIP CEDILLO, Appellant,

v.

Agency: Denver Department of Human Services and the City and County of Denver, a municipal corporation.

INTRODUCTION

For purposes of these Findings and Order, Phillip Cedillo shall be referred to as "Appellant." The Denver Department of Human Services shall be referred to as the "Department." The City and County of Denver shall be referred to as the "City". The Rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held October 15 and 17, 2002, before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant was present and was represented by Mark Scwhane, Esq. The Department and City were represented by Niels Loechell, Esq., Assistant City Attorney, with Kathy Rodriguez serving as the advisory witness.

The Hearing Officer has considered the following evidence in this decision:

The following witnesses were called by and testified on behalf of the Department:

Kathy Rodriguez, Randy Martinez, Tom Battany

The following witnesses were called by and testified on behalf of the Appellant:

Appellant, Alan A. Herrera, Scott Alan Gates, Diana Smith

The following exhibits were offered and admitted into evidence on behalf of the Department:

Exhibits 1 - 11

The following exhibits were offered and admitted into evidence on behalf of the Appellant:

Exhibits A - EE

The following exhibits were admitted into evidence by stipulation:

Exhibits 1-11, A - EE

The following exhibits were offered but not admitted into evidence and therefore not considered in this decision:

None

NATURE OF APPEAL

Appellant is appealing his termination from the Department for alleged violations of CSR §§16-50 A. 1), 7), 19) and 20) and 16-51 A. 2), 10) and 11). He alleges disability discrimination. He is seeking reinstatement to his position, along with back pay and all rights and benefits attendant thereto.

ISSUES ON APPEAL

Whether the Hearing Officer has subject matter jurisdiction over this appeal?

Whether Appellant violated CSR §§16-50 A. 1), 7), 19) and 20) and 16-51 A. 2), 10) and 11)?

If Appellant violated any provisions of CSR §§16-50 and 16-51, what is the appropriate sanction?

Whether the Department's decision to terminate Appellant was disability discrimination?

PRELIMINARY MATTERS

Appellant received a "Below Expectations" Performance Enhancement Program Report ("PEPR") in December 2001. Appellant appealed this evaluation to the Hearing Officer. By an order dated August 14, 2002, the Hearing Officer found that the below expectations rating was arbitrary, capricious, and without rational basis or foundation, in violation of CSR §19-10 e). The appeal was

granted and the Department was ordered to change the December 2001 PEPR to "Meets Expectations." (*See, In the Matter of Phillip Cedillo*, Appeal No. 29-02)

While the appeal was pending, the Department revaluated Appellant's performance, pursuant to CSR § 13-41, on March 15, 2002. Appellant was given an interim PEPR. He was evaluated "Below Expectations." Appellant appealed this finding to the Hearing Officer in a timely manner. (Appeal No. 85-02)

As set out more fully below, the Department reviewed Appellant's performance again in June 2002. As a result, Appellant was issued a third "Below Expectations" PEPR evaluation. Appellant's employment was subsequently terminated. Appellant appealed the termination on July 9, 2002. (Appeal No. 130-02)

Due to the interlocking nature of the second two appeals, the Hearing Officer consolidated them in the interest of judicial economy on July 11, 2002.

A prehearing conference was held on August 19, 2002. At that time the Hearing Officer found that the interim PEPR that was the basis of Appeal No. 85-02 was moot because the December PEPR, which triggered the 90-day interim review, was improperly issued. The grievance appeal was dismissed.

The parties were also informed on the record that Hearing Officer would be taking evidence only on Appeal No. 130-02 except that the alleged violation of CSR 16-50 A. 19) was dismissed because, based upon the Hearing Officer's ruling regarding the inappropriateness of the December 2001 PEPR, this allegation no longer existed as a matter of law. The parties were instructed that the PEPRs could be used to establish notice of specific performance standards and deficiencies which could be used to prove, or disprove, violations of CSR §§ 16-50 A. 1) and 16-51 A. 2).

FINDINGS OF FACT

1. During the relevant period, Appellant was employed by the Department as an Administrative Support Assistant IV. His internal title was Intake Technician, assigned to the Intake Team for the Child Support Division. He worked for the Department for approximately three and a half years.

2. Appellant's duties included assisting Temporary Assistance for Needy Families (TANF") clients after they complete their orientation. He was assisted them in completing their applications for temporary assistance and would monitor their cases until they became financially active, at which time the case would be referred to the child support case worker. More specifically, his duties included entering information into the computer, interviewing clients, preparing affidavits naming the father (if it was not on the child's birth certificate) for the client's signature, and preparing contact sheets.

3. On September 30, 1999, Appellant was in a road rage/automobile accident. The other driver nearly clipped Appellant's car when coming out of a side street, stopped his car at a red light and then put it into reverse, going into Appellant's car behind him. When Appellant got out of his car to assess the damage and get the other driver's information, the other driver got out of his car and went up to Appellant and hit Appellant with such force that he suffered a concussion and passed out. Appellant was taken to the hospital by ambulance. Appellant was off work for one day. Appellant went to his family practice doctor once after the accident. As a result of his accident, Appellant suffered from constant headaches and possible TMJ. He began taking Tylenol "like candy." He did not receive any other immediate treatment.

4. Appellant kept his supervisor aware of any obstacles he was experiencing due to his physical problems. His work performance actually improved during the first year (*See* Exhibit O)

5. By 2001, Appellant began to experience headaches, vision and balance problems, and problems concentrating. Appellant attributed this not only to his accident, but to the additional stress he experienced when his mother died eight months after the accident. Appellant was often absent because of his health problems, although he did not use Family Medical Leave.

6. During the summer of 2001, Appellant went to his see his family physician for treatment of his physical problems. The family practitioner referred Appellant to a neurologist at that time. Due to monetary constraints, Appellant did not see the neurologist.

7. After Appellant received a written reprimand for abuse of leave over the previous eighteen months in September 2001, Appellant again went to his family practitioner, who indicated the following, in relevant part:

> 1. Diagnosis and corrective measures and or medication to address the conditions:
>
> Chronic post traumatic stress/tension headaches. Also has basilar artery damage resulting in cerebella dysfunctions – valium, nortriptyline, percocet, flexent (sic), phenergor (sic)
>
> 2. In your opinion what **major life activities** are substantially limited by this diagnosis?
>
> 1) speaking – decreased ability to articulate and stuttering
> 2) walking – loss of equilibrium
> 3) working

The physician indicated that Appellant was capable of returning to work with

permanent restrictions. To the question as to whether Appellant was capable of doing repetitive activities including typing, writing, data entry, the physician indicate "Yes" with the following note after "Frequency and duration": "Yes, but limited by headaches and vertigo – limited to ~1 hr. at a time" The physician also indicated that there was a psychological restriction: "stress seems to increase headaches, blurry vision, and increase vertigo – must avoid stressful situation." (Exhibit F)

8. This Release of Medical Information and Physical Capabilities Form was submitted by Appellant to the Department and the Career Service Authority as part of a interactive process initiated by Appellant after having received the September 2001 written reprimand.

9. Prior to the hearing, Appellant saw a neurologist and began treatment with the LoDo Pain and Headache Clinic. According to Richard L. Steif, M.D., MHS,

> [I]n answer to your specific question, it is more likely than not, based on a reasonable degree of medical probability, that Mr. Cedillo was suffering with bonafide headaches, cognitive complaints, and dizziness following his assault on 09/30/99, and that these symptoms would definitely have affected his performance at work. His ability to concentrate, recall events and perform tasks requiring his full attention and abstract reasoning would have all been affected. In fact, it would have affected his performance adversely, in my opinion, in any work setting.
>
> I am making this statement with full knowledge that Mr. Cedillo did not seek any medical attention for a period of 10 months after his injury, and with the full knowledge that there are psychosocial issues that also play a role in his recovery.
>
> All that having been said, however, there is objective evidence that Mr. Cedillo had a brainstem injury. ... This makes it equally likely that his complaints of headache and cognitive disturbance are bonafide, particularly since he is now responding positively to medication in terms of headache management...

(Exhibit FF)

10. Throughout the fall and early winter of 2001-2002, Rita Murphy, R.N., M.S., the ADA Coordinator for the CSA, sought additional clarification from Appellant regarding ways to handle his stress. These included taking stress management and time management courses, taking five -minutes breaks every hour, and looking for other job opportunities within the Department or the City. (*See* Exhibits G and R) Ms. Murphy notified the Department that providing the

five-minute breaks were a reasonable accommodation for Appellant. She also indicated that the family physician was unable to give any specific recommendations for avoiding stress since " individuals manage stress differently." (Exhibit R)

11. Appellant testified that he did not always get his five minute breaks every hour. The Department's witnesses testified that they never stopped him from taking breaks.

12. Appellant's strong suit was interviewing clients. He had more difficulty doing the computer entries, particularly after his injury.

13. Prior to May 2001, there were twelve technicians assigned into intake "teams," each team working for a team of child support social case workers. The Intake Technicians were responsible for monitoring ninety to one hundred and twenty cases. In or around May 2001, the Intake Unit staff was reduced from twelve to nine technicians. Their duties were changed and work was redistributed. They began handling non-public assistance cases. Their work was now assigned on a rotational basis.

14. The Intake Unit underwent other changes over the summer of 2001. Peter Dever, the new Division Director, initiated a "cradle-to-grave" model for case management. This model means that, after initial intake, the technician handling the case "upstairs" (i.e., in the Child Support Unit with the social case workers on the fourth floor, rather than in the Intake Unit) handled the case all the way through. Because of these changes in the "upstairs" technicians' duties, more were moved upstairs and the size of the Intake Unit was reduced from nine to seven.[1]

15. Kathy Rodriguez became Appellant's supervisor in January 2002. When she took over the Unit, it was in disarray and turmoil. The Intake Technicians were very stressed as a result

16. By April 2002 there was a considerable backlog in the Intake Unit due to the effects of the "cradle-to-grave" reorganization on the Unit. In order to reduce the backlog, the Intake Technicians were asked to work on and complete the initiations for five cases a day from the backlog, in addition to their regularly assigned duties of interviewing clients and initiating the process for current cases.

17. "Initiating" a case required the Intake Technician to complete the paperwork and enter information into the computer for cases after they became

[1] Testimony differed as to the number of Intake Technicians originally in the Unit and the number that is was reduced to. According to Ms. Rodriguez, it went from thirteen to eight; according to others, the number of technicians went from twelve to seven. It may be that Ms. Rodriguez was including the supervisor in her count while the other witnesses did not.

financially "active, after which they would be referred to the Child Support Unit for other technicians and the social case workers to handle.

18. According to Ms. Rodriguez, it takes twenty to forty-five minutes to initiate a case, depending on its complexity.

19. According to Ms. Rodriguez, each Intake Technician was given a "protected" day" when he or she was supposed to be working only on initiating cases. It was believed that this way the backlog could be handled by the Intake Team.

20. Ms. Rodriguez testified that none of the Intake Technicians were consistently completing the five additional case initiations a day.

21. Scott Gates is another ASA IV in the Intake Unit. He has been in the Unit since 1992. He served as a lead worker when Jane Saari, the supervisor immediately before Ms. Rodriguez, was supervisor. He testified that, had he been assigned duties similar to Appellant, he would have found it impossible to complete five initiations in addition to his regular workload per day. He stated that he did not believe that many of the other Intake Technicians were meeting the five initiations from the backlog per day standard. He stated that, if the Intake Unit was up to the full compliment of eleven or twelve Intake Technicians, there would have been time for them to get to the five additional initiations per day.

22. Appellant testified during the predisciplinary meeting and during the hearing that, while he was unable to do five additional cases per day, he believed he could do an additional two and a half cases per day.

23. There were no statistics generated prior to May 2002 that would show the number of cases completed by each of the Intake Technicians. Statistics were generated in May and June.

24. According to the statistics generated for May and June 2002, the Intake Technicians performed the following number of interviews:

	MAY	JUNE	TOTALS
YV	86	89	175
VS	48	78	126
TS	30	15	45
PC[2]	72	0	72
LO	91	105	196
DM	78	86	164
BW	29	36	65
TOTAL	434	409	843

[2] "PC" refers to Appellant.

(Exhibit W)

25. Statistics for the Intake Team for May and June provides the following information:

MAY 2002

	Referrals	Cases Initiated	Cases Updated
BW	53	40	59
LC	0	54	99
VS	49	30	22
DM	96	14	25
LO	117	0	0
LS	55	51	60
YV	93	47	42
PC	79	16	19
SG	30	72	16
TOTAL	572	339	342

JUNE 2002

	Referrals	Cases Initiated	Cases Updated
BW	43	96	137
LC	0	79	182
VS	107	37	8
DM	118	19	13
LO	40	0	0
MEC	88	0	0
LS	51	31	49
YV	112	24	25
PC	60	1	2
SG	?(sic)	72	32
TOTAL	619	359	448

See Exhibits X and Y

26. Ms. Rodriguez testified that there are various reasons for the differences in each individual's interview and other performance rates, including job assignments, length of the interviews, and number of days worked during the month.

27. No one testified as to how many days Appellant worked during either May or June.

28. Appellant's "interview packets" were reviewed by Tom Battany for

Ms. Rodriguez on or about May 17 and again on June 6. During his review, Mr. Battany noted that several cases had not yet been completed. (Exhibits 5, 6 and 7) During her testimony, Ms. Rodriguez was unable to testify whether or not it was unusual for many of the noted items not to be completed within the time period noted.

29. The requirement that Appellant complete five additional cases a day was not incorporated into his interim PEPR. (*See* Exhibit 9)

30. Appellant was notified on June 11, 2002, that discipline was contemplated for alleged violations of CSR §§ 16-50 A. and 16-51 A. (Exhibit 4) The predisciplinary meeting was held on June 26. Appellant received notification that he was terminated from his position on July 1, 2002.

31. Appellant filed his appeal with the Hearing Officer in a timely manner.

32. None of the intake Technicians met the five additional cases per day standard. Only Appellant was disciplined for failing to meet the standard.

33. The Department reorganized the Intake Unit during the summer of 2002 and returned the Unit to twelve Intake Technicians. As a result of this additional staff, the backlog is now being eliminated.

DISCUSSION AND CONCLUSIONS OF LAW

Applicable Rules and Statutes

CSR Rule 15 is the Code of Conduct for employees in the Career Service. CSR §15-106, Retaliation Prohibited, provides:

CSR Rule 16 governs discipline. CSR §16-10 sets out the purpose of the Rule:

> The purpose of discipline is to correct inappropriate behavior or performance. The type and severity of discipline depends on the gravity of the infraction. The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record. The appointing authority or designee will impose the type and amount of discipline she/he believes is needed to correct the situation and achieve the desired behavior or performance.
>
> The disciplinary action taken must be consistent with this rule. Disciplinary action may be taken for other inappropriate conduct not

specifically identified in this rule.

CSR §16-20, Progressive Discipline, provides in relevant part:

1) In order of increasing severity, the disciplinary actions which an appointing authority or designee may take against an employee for violation of career service rules, the Charter of the City and County of Denver, or the Revised Municipal Code of the City and County of Denver include:

   a) Verbal reprimand, which must be accompanied by a notation in the supervisor's file and the agency file on the employee;

   b) Written reprimand, a copy of which shall be placed in the employee's personnel file kept at Career Service Authority;

   c) Suspension without pay, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority;

   d) Involuntary demotion, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority; and

   e) Dismissal, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority.

2) Wherever practicable, discipline shall be progressive. However, any measure or level of discipline may be used in any given situation as appropriate. This rule should not be interpreted to mean that progressive discipline must be taken before an employee may be dismissed.

CSR §16-50, Discipline and Termination, provides, in relevant part:

A. Causes for dismissal.

The following may be cause for dismissal of a career service employee. A lesser discipline other than dismissal may be imposed where circumstances warrant. It is impossible to identify within this rule all conduct which may be cause for discipline. Therefore, this is not an exclusive list.

1) Gross negligence or willful neglect of duty.

7) Refusing to comply with the orders of an authorized supervisor or refusing to do assigned work, which the employee is capable of performing.

19) Failure to meet established standards of performance in three successive rating periods.

20) Conduct not specifically identified herein may also be cause for dismissal.

CSR §16-51, Causes for Progressive Discipline, provides, in relevant part:

A. The following unacceptable behavior or performance may be cause for progressive discipline. Under appropriate circumstances, immediate dismissal may be warranted. Failure to correct behavior or committing additional violations after progressive discipline has been taken may subject the employee to further discipline, up to and including dismissal from employment. It is impossible to identify within this rule all potential grounds for disciplinary action; therefore, this is not an exclusive list.

2) Failure to meet established standards of performance including either qualitative or quantitative standards.

10) Failure to comply with the instructions of an authorized supervisor.

11) Conduct not specifically identified herein may be cause for progressive discipline.

CSR §19-10 covers actions subject to appeal. It provides in relevant part:

§19-10 Actions Subject to Appeal

The following administrative actions relating to personnel matters shall be subject to appeal:

b) Actions of an appointing authority: Any action of an appointing authority resulting in dismissal, suspension, involuntary demotion, disqualification, layoff, or involuntary retirement other than retirement due to age which results in alleged

violation of the Career Service Charter Provisions or Ordinance relating to the Career Service, or the Personnel Rules.

Analysis

The City Charter C5.25 (4) requires the Hearing Officer to determine the facts in this matter "de novo." This has been determined by the Courts to mean an independent fact-finding hearing considering evidence submitted at the de novo hearing and resolution of factual disputes. *Turner v. Rossmiller*, 35 Co. App. 329, 532 P.2d 751 (Colo. Ct. of App., 1975)

Because this is an appeal of a disciplinary action (termination), the Department has the burden of proof to demonstrate that its decision was within its discretion and appropriate under the circumstances. Appellant, having raised disability discrimination as affirmative defenses, has the burden to establish that the Department's decision was discriminatory in nature.

Appellant has been charged with violating several provisions of CSR Rule 16. The first of these is he violated CSR §16-50-A. 1), "gross negligence or willful neglect of duty." The Department's closing argument seems to concede that this violation was not established. Even if this were not the case, the Hearing Officer concludes that it was not established.

Neither "gross negligence" nor willful neglect of duty" is defined in the CSR. The Hearing Officer must look elsewhere for their definitions. They are terms well-defined in the law. Negligence does not require intent. It is commonly defined as the failure to use reasonable care or a failure to act in a reasonably prudent manner under the circumstances. *Lavine v. Clear Creek Skiing Corp.*, 557 F.2d730 (10th Cir. 1977); *Metropolitan Gas Repair Service, Inc. v. Kulik*, 621 P.2d 313 (Colo. 1980); *Rice v. Eriksen*, 476 P.2d 579 (Colo. App. 1970). Gross negligence involves a higher form of culpability than mere negligence. "Gross" in this context means flagrant or beyond all allowance, *Lee v. State Board of Dental Examiners*, 654 P.2d 839 (Colo. 1982), or showing an utter lack of responsibility. *People v. Blewitt*, 192 Colo. 483, 563 P.2d 1 (1977). Willful neglect of duty transcends any form of negligence and involves conscious or deliberate acts. *See Turner v. Lyon*, 189 Colo. 234, 539 P.2d 125 (1976); *Drake v. Albeke*, 188 Colo. 14, 532 P.2d 225 (1975).

"Gross" has been defined as "immediately obvious" or "glaringly noticeable usually because of inexcusable badness or objectionableness."[3] *Black's* defines it as"

> [G]reat; culpable. General absolute; not to be excused; flagrant; shameful; as a gross dereliction of duty; a gross injustice; gross

[3] *Miriam-Webster's Collegiate Dictionary*, 10th Ed., 1993

carelessness.[4]

"Gross negligence" is defined by *Black's* as:

> The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness. "Gross negligence is substantially higher in magnitude than simple inadvertence, but falls short of intentional wrong." (Cite omitted)[5]

In other words, "gross negligence" does not require that the Department show that Appellant intentionally acted in a wrongful manner, just that he performed his work in a manner that was more than careless or inadvertent and that the failure to perform the work was obviously unreasonable or inappropriate.

On the other hand, "willful neglect" implies that the wrongful conduct was intentional or conscious, not merely negligent. "Willful" is generally defined as "obstinately and often perversely self-willed; done deliberately."[6]

Black's defines "willful" as:

> Proceeding from a conscious motion of the will; voluntary. (Cite omitted)...Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary...A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. (Cite omitted.)[7]

The Hearing Officer has considered the testimony offered during the hearing. Based upon all the evidence, the Hearing Officer concludes that the Department has failed to prove by a preponderance of the evidence that Appellant's work performance was either grossly negligent or willful neglect.[8]

Negligence, whether "gross" or not, requires that the actor act in an unreasonable manner. The problem for the Department in meeting the burden of proof for this allegation is that their own witnesses testified that none of the Intake Unit team members consistently met the five additional cases per day standard.

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[4] *Black's Law Dictionary*, 4th Ed., 1951
[5] *ibid.*
[6] *Miriam-Webster's, op cit.*
[7] *Black's, op cit.*
[8] It is interesting to note that Appellant was not charged with violating a related provision, CSR §16-51 A. 6), "carelessness in performance of duties and responsibilities," a provision that does not require either the reckless disregard of the consequences or the intentional performance failures that are necessary to establish either "gross negligence" or "willful neglect." The Hearing Officer will not comment as to whether Appellant's alleged conduct might have violated this lesser standard.

Since none of his co-workers were able to meet the five additional cases a day standard, Appellant's failure to do so is not unreasonable. Even simple negligence has not been established. It is plain that "gross" negligence does not exist.

The same holds true for willful neglect. Since none of his co-workers were able to perform the additional work on a consistent basis, it was not willful neglect for Appellant to fail to meet this clearly unreasonable standard.

Even if the other Intake Technicians were accomplishing the additional five case initiations a day, the Department still would not have established the violation of this provision.

Appellant requested, as an accommodation due to his medical condition, a five-minute break every hour. The Department agreed to this.[9] The effect of this accommodation would mean that Appellant should have been spending, over the course of an eight-hour day, forty minutes less performing his work than his co-workers. Ms. Rodriguez testified that it took between twenty to forty-five minutes to initiate a case. Simple arithmetic reveals that Appellant's ability to complete the additional initiations was reduced, just by making this reasonable accommodation, by at least one or two cases each day. The Department did not take this into account when holding Appellant to the five cases a day standard, even when Appellant indicated in the predisciplinary meeting that he thought he could do two and a half additional cases per day. Because the Department failed to account for a reasonable accommodation and adjust the five additional cases a day standard for Appellant, it cannot come back and say that Appellant's failure to meet what has now become an unreasonable requirement is either gross negligence or willful neglect.

Appellant is charged with violating CSR 16-51 A. 2), the failure to meet established standards of performance. In its closing argument, the Department focused on this violation as the center of its case and as real basis for Appellant's termination.

The requirements for this provision are not identical to the requirement for violations of CSR §§16-50 A. 1). This provision covers performance deficiencies that can be measured by either qualitative or quantitative standards, such as those one would find in a performance evaluation, in a classification description, or in agency or division's published policy and procedures.

The Department has not produced any evidence that Appellant failed to

[9] Appellant did not produce documentation from his neurologist about the effects of his brain injury upon his functioning until well after his termination. Still, given that the witnesses agreed that Appellant's strong point was interviewing and that he was weaker doing the computer work – whether or not this was due to a neurological difficulty or not – another way the Department might have supported Appellant, and still met its goal of reducing the backlog, was to have him do more interviews while other employees were doing the intensive computer work necessary for initiating cases.

meet any established standards of performance. It was not included in Appellant's interim PEPRs that were written in 2002, after the backlog became such an issue. (*See,* Exhibits 9 and L) The PEPRs are the first place to look to see if the additional five cases per day had been included as a specific performance standard.

The Hearing Officer acknowledges that there are other sources for performance standards, such as classification requirements, Departmental policy and procedural manuals, and other documentation giving employees notice of their job requirements. None of those were produced.

The Department was unable make a cogent argument that it was an "unofficial" performance standard for the entire Intake Team since none of the Team was able to meet this "standard." This violation is dismissed.

Appellant is charged with violating CSR §16-50 A. 7), failure to comply with the orders of his authorized supervisor and refusing to do assigned work which he is capable of performing. The Department did not establish this violation. As stated above, no one in the Intake Unit was able to do the additional five case initiations per day on a consistent basis. This means that no one, including Appellant, was capable of performing the work requested. In addition, given the fact that Appellant was given more break time than his fellow Intake Technicians as part of the reasonable accommodation that the Department agreed to, the Department was unable to establish that Appellant had the ability to perform the additional work.

Likewise, the violation of CSR §16-51 A. 10), failure to comply with the instructions of an authorized supervisor, is dismissed. This provision is meant to cover employees who refuse to comply with requests or instructions from any supervisor, not the inability to comply with something that Appellant did not have the ability to perform. Appellant did not refuse to do the work. He tried to comply to the best of his ability. The Department did not establish this violation.

As previously discussed, the allegation that Appellant failed to meet established standards of performance in three successive rating periods, a violation of CSR §16-50 A. 29), is dismissed as moot.

The violations under CSR §§16-50 A. 20) and 16-51 A. 11) are dismissed. The Department produced evidence that was meant to establish violations of specific provision of CSR §§16-50 A. and 16-51 A. The fact that it was unable to produce sufficient evidence to establish these violations does not mean that the Department can use these catchall provisions to correct the failures of its evidence in meeting the requirements of more specific provisions.

Because the Department has failed to establish any of its allegations by a preponderance of the evidence, the issue of disability discrimination is moot, except to the extent noted (*i.e.,* that the requirement that Appellant still had to meet the five

additional cases a day requirement despite the fact that he was effectively working forty minutes less a day than his peers was not a reasonable accommodation).

In its closing arguments, the Department abandons the position that Appellant violated CSR §16-50 A. 1) and argues that a violation of CSR §16-51 A. 2) is sufficient to support termination. While the issue of appropriate discipline is moot, the Hearing Officer disagrees with this conclusion. Discipline under CSR §16-51 A. is progressive. Appellant did not have a prior disciplinary history that would support termination as the appropriate level of progressive discipline. His last discipline was a written reprimand in September 2001. Further, no other employees were disciplined in any way, no less terminated for failing to produce an additional five cases per day. Even if the Department had been able to prove a violation of CSR §16-51 A. 2), termination was inappropriate.

ORDER

Therefore, for the foregoing reasons, the Hearing Officer REVERSES the disciplinary action. The Department is ORDERED to reinstate Appellant as an Administrative Support Assistant IV and award him back pay and benefits dating back to the date of his termination.

Dated this 18th day of December 2002.

Robin R. Rossenfeld
Hearing Officer for the
Career Service Board