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

Appeal No. 16-03

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

IRENE D. CORTEZ, Appellant,

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

Hearing in this matter was held before Michael S. Gallegos, Hearing Officer, on May 20, 2003, in the Career Service Hearings Office, 201 West Colfax, 1st Floor, Denver, Colorado 80202. Appellant, Irene D. Cortez, appeared in person and was represented by Cheryl Hutchison, AFSCME. The Agency was represented by Assistant City Attorney, Niels Loechell. Ms. Jan McIntosh was the Agency's advisory witness at hearing.

Within these Findings and Order, the Hearing Officer refers to Irene D. Cortez as "Appellant"; the Denver Department of Human Services as the "Agency"; the Agency's Manager at the time of hearing, Donna Good, as the "Manager" and the Career Service Rules as "Career Service Rules" or "CSR". The Career Service Rules are cited by section number and are those currently in effect unless otherwise indicated.

For the reasons set forth below, the disciplinary action taken by the Agency against Appellant is **REVERSED**.

ISSUES FOR HEARING

Whether there is cause for disciplinary action against Appellant and, if so, whether the degree of discipline imposed is reasonably related to the severity of the offense.

BURDEN OF PROOF

The burden of proof is upon the Agency to show, by a preponderance of the evidence, that there is cause for disciplinary action against Appellant and that

the degree of discipline imposed is reasonably related to the severity of the offense.

PRELIMINARY MATTERS

The parties stipulated to the acceptance of Appellant's Exhibits A through D, without the typewritten narratives, and the Agency's Exhibits 1 through 8, as offered.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Hearing Officer finds the following to be fact:

1. Appellant is a Human Services Supervisor for the Agency. Her duties include direct supervision of the Child Abuse and Neglect Hotline (Hotline). The Hotline is a telephone number designated for the direct reporting of child abuse or neglect to the Agency. State Department of Human Services regulations mandate that the Hotline be available 24 hours per day, 7 days per week, 365 days per year. (*See* Volume 7, Colorado Code of Regulations (CCR) Section 7.202.4.)

2. The Agency is a city agency subject also to state and federal regulations. In order to comply with state regulations, the Hotline is staffed by Agency employees 18 hours per day, 7 days per week. An answering service with a live operator completes the remaining 6 hours per day, 7 days per week. Beginning in July 2002, the Hotline was short 2 staff persons. Due to budgetary constraints, the 2 staff persons were not replaced and the Hotline remained short-staffed through 2002 and into 2003.

3. At the end of November 2002, Appellant assigned the holiday Hotline shift for Christmas Day.

4. On December 2, 2002, the Manager instituted the following policy, effective on that date: "There will be no paid overtime or compensatory time taken without the advance written approval of [the Manager]. Any violation of this policy will result in disciplinary actions being taken. All accrued compensatory time already earned must be taken by June 30, 2003." This policy was sent to Agency staff, including Appellant, by Diana Smith (Smith) via E-mail at approximately 4:43 p.m. on December 2, 2002.

5. The policy does not address how a request for overtime pay should be formatted or delivered to the Manager. The terms "advance" and "written approval" are not defined within the policy. However, the Manager interprets the policy to require a written *request*, including E-mail requests and, further

interprets the policy, to allow *verbal* approvals from the Manager for overtime pay. No specific dollar amount for the overtime pay was required. The Manager's interpretation of the policy was not communicated to Appellant.

6. On December 3, 2002, Appellant sent an E-mail to her supervisors requesting guidance regarding the new policy because the Hotline was staffed by the Agency 18 hours per day, 7 days per week which required overtime pay on holidays. Neither supervisor responded to Appellant's E-mail. However, Appellant's supervisors verbally instructed her to put together a budget for the Hotline showing estimated overtime pay for the next year.

7. Appellant requested and received overtime fund information for the Hotline from budget years 2001 and 2002. Additionally, in order to insure that the Hotline was staffed by the Agency 18 hours per day, 7 days per week, Appellant took many Hotline shifts without overtime pay or "comp time" and she volunteered to take a 2 hour shift on every holiday so Hotline staff members could each take a regular 8 hours shift. Appellant knew that it would be negligent, and that she could be disciplined, for failure to keep the Hotline staffed for the Agency's 18 hours portion of every 24 hours.

8. In early December, Appellant began a dialogue with her supervisors about adequate staffing for the Hotline and the need for overtime hours/pay in order to remain in compliance with state regulations. Appellant's immediate supervisor was Corey Johnson (Johnson) and his supervisor was Jan McIntosh (McIntosh). Johnson was on vacation during early December 2002 and, upon his return, instructed appellant to get approval for all holidays "as a whole". McIntosh came to the conclusion that they could not have a long-term solution in place by "the holidays". Neither Johnson nor McIntosh advised or directed Appellant to request overtime approval for the Christmas and New Year holidays apart from other holidays. They assumed Appellant would request approval for the holidays while working on a long-term solution and budget.

9. Based on discussions with her supervisors, Appellant believed that she needed to submit a completed budget to the Manager with her request for overtime pay for the Hotline staff during the holidays. She continued to research alternatives but was unable to complete an annual overtime budget for the Hotline before Christmas day. Appellant made sure that the Hotline was staffed for Christmas day by taking a 2 hours shift and scheduling 2 overtime 8 hours shifts. At the same time, Appellant continued to work on an overtime budget proposal for submission to the Manager.

10. Appellant believed she did not have enough information to request Christmas Day overtime pay for the Hotline and that scheduling overtime/holiday shifts for the Hotline, without the Manager's approval, was necessary to avoid a specific and imminent harm - closing down the Hotline. She knew that if she did not schedule overtime/holiday shifts for Christmas day, reports of child abuse or

neglect could not be received and the Agency would be in violation of state regulations. Additionally, there could be federal funding consequences.

11. On December 31, 2002, at approximately 11:52 a.m., Appellant sent an E-mail to the Manager requesting approval for overtime pay for Hotline staff on Christmas and New Year's Day. At approximately 12:37 a.m. on December 31, 2002, the Manager began to investigate Appellant's request, why it was after-the-fact for Christmas and such short notice (½ a day) for New Year's Day. The Manager verbally approved the Hotline overtime for New Year's Day but did not advise Appellant or her supervisors that she had approved New Year's Day overtime.

12. Appellant received no response to her E-mail request for approval of Hotline overtime for Christmas and New Year's Day. She heard nothing from the Manager or her supervisors until she received a Written Reprimand, on January 6, 2003, for failure to observe department regulations by authorizing "individuals under your supervision to work overtime on both the Christmas and New Year holidays without gaining prior approval from [the Manager]."

13. Appellant's supervisor, Johnson, was on vacation from December 24, 2002 to January 6, 2003. Therefore, McIntosh was the supervisor who issued the Written Reprimand to Appellant. At the time she issued the Written Reprimand to Appellant, McIntosh was not aware that the Manager had approved New Year's Day overtime for the Hotline staff.

14. Appellant determined that she did not have to submit an annual overtime budget in order to receive approval for specific holidays. Therefore, on January 7, 2003, by E-mail to the Manager, Appellant requested approval for Hotline overtime pay for the Martin Luther King holiday on January 20, 2003. She also requested the opportunity to present a long-term plan for continuing Hotline overtime.

15. On January 14, 2003, Appellant timely filed a grievance regarding the Written Reprimand with her supervisor. The first level grievance was denied on January 23, 2003. Appellant timely served a copy of the grievance on the Manager on January 24, 2003. However, the Manager did not respond to Appellant's second-level grievance. Therefore, Appellant had 10 days from January 3, 2003 to file her appeal. She timely filed her appeal in this matter on January 12, 2003

16. If Appellant had failed to schedule Hotline staff for the Agency's 18 hour portion of Christmas Day, Appellant would have been disciplined for neglect of duty in failing to comply with state regulations to keep the Hotline available 24 hours per day.

17. Staffing the Hotline on Christmas Day, 2002, was the least harmful alternative to avoid the harm (closing down the Hotline), reasonably believed by Appellant to be certain to occur. By staffing the Hotline on Christmas Day, without prior approval, Appellant acted to avoid a greater harm than discipline against her.

DISCUSSION

1. Authority of the Hearing Officer: The City Charter and Career Service Rules require the Hearing Officer to determine the facts, by *de novo* hearing, in "[a]ny action of an appointing authority resulting in dismissal, suspension, involuntary demotion...which results in alleged violation of the Career Service Charter Provisions or Ordinance relating to the Career Service, or the Personnel Rules." (City Charter C5.25 (4) and CSR 19-10 b).) A *de novo* hearing is one in which the Hearing Officer makes independent findings of fact, credibility assessments and resolves factual disputes. (*See Turner v. Rossmiller*, 35 Co. App. 329, 532 P.2d 751 (Colo. App.1975).)

2. Cause for discipline: Career Service Rules provide, in pertinent part: "The purpose of discipline is to correct inappropriate behavior or performance." (*See* CSR 16-10.) In this case, the Hearing Officer concludes that Appellant acted reasonably and as she was instructed. Therefore, Appellant acted appropriately at all times relevant to this case. Beginning the day after the no-overtime policy was issued, Appellant consistently sought out guidance and information from her supervisors and co-workers as to how best comply with the policy without violating state regulations. She followed the advice of her supervisors and immediately began to prepare an annual overtime budget for the Hotline. Appellant continued to prepare her request for overtime/holiday pay for Hotline staff, while she covered shifts and holiday hours at the Hotline without overtime or "comp time".

The written policy, delivered by E-mail, does not address how a request for overtime pay should be formatted or delivered to the Manager. Appellant's supervisors didn't tell her that she could request overtime by E-mail to the Manager. By the time Appellant figured out that she could request overtime pay for holidays, *without* an annual budget proposal, Christmas day had passed and New Year's Day was upon her. Appellant decided she had to do something and, on the day before New Year's Day, by E-mail she requested overtime for the Hotline staff. On that same day, the Manager approved overtime pay for the Hotline staff for New Year's Day. That is, Appellant *did* get advance authorization for overtime pay for New Year's Day. Therefore, the Hearing Officer concludes that there is no cause to discipline Appellant for failure to get advance authorization for New Year's Day.

With regard to Appellant's failure to get advance authorization for overtime on Christmas Day, Appellant knew it would be negligent (and that she would be

disciplined) if she failed to keep the Hotline staffed for the Agency's 18 hour portion of every 24 hours. Therefore, faced with a "choice of evils" (disciplinary action for scheduling overtime/holiday staffing of the Hotline vs. disciplinary action for failing to staff the Hotline), Appellant chose the course of action that would cause the least disruption to the mandates, goals and objectives of the Hotline and the Agency.

3. Choice of disciplines: Employment law provides that employees may agree to an employer's choice of discipline or a range of discipline for a given action or category of actions. (*See Conoco, Inc. v. Oil, Chem.& Atomic Workers Int'l Union*, 26 F. Supp. 2d 1310, U.S. District Court, OK, 1998 and *Spears v. Beauregard Parish Sch. Bd.*, 732 So. 2d 671, LA, App. 3 Cir, 1999.) However, the Hearing Officer could find no rule or law granting an employer the authority to place an employee in a "choice of evils" situation where any and all actions taken by the employee result in discipline. A "choice of evils" defense does exist in the criminal law arena and requires a showing that the person making the choice (1) acted to avoid a greater harm, (2) that he or she reasonably believed was necessary to avoid a specific and immediately imminent harm and (3) he or she reasonably believed that the selected action was the least harmful alternative to avoid the harm, either actual or reasonably believed by the person to be certain to occur. (*State of Nebraska v. Wells*, 598 N.W. 2d, 30, Sup. Ct. NE, 1999.)

Reasoning by analogy from criminal law, the specific and imminent harm that Appellant sought to avoid was closing down the Hotline. She knew that if she didn't schedule overtime/holiday shifts for Christmas day, reports of child abuse or neglect could not be received, the Agency would be in violation of state regulations and that there could be federal funding consequences. (*See* (2) above.) Because the manner, contents and timing of a request for overtime pay approval were not made clear by the policy and based on the advice of her supervisors, (*See* Findings of Fact, paragraph 5, 6 and 9.), Appellant reasonably believed she did not have enough information to request Christmas Day overtime pay for the Hotline. Therefore, staffing the Hotline on Christmas Day, 2002, was the least harmful alternative to avoid the harm, reasonably believed by Appellant to be certain to occur. (*See* (3) above.) By staffing the Hotline on Christmas Day, without prior approval, Appellant acted to avoid a greater harm than discipline against her. (*See* (1) above.) Therefore, the Hearing Officer concludes that Appellant acted reasonably and appropriate at all time relevant to this appeal.

The Hearing Officer concludes that it is unreasonable to place any employee in a position where all courses of action result in discipline and that, in this case, the Agency acted unreasonably in disciplining Appellant for choosing the lesser of two evils. Considering the totality of the circumstances in this case, the Hearing Officer concludes that there is no cause for discipline in this matter.

4. Degree of discipline: Career Service Rules provide, in pertinent part: "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." (*See* CSR 16-10). The issue of degree of discipline is moot in that there is no cause for discipline in this case.

CONCLUSIONS OF LAW

1. The Hearing Officer has jurisdiction over this matter and the authority to make and issue Findings and Order in this matter.

2. The Agency did not meet its burden to show there is cause for discipline.

3. The issue of whether the level of discipline imposed is reasonably related to the severity of the offense is moot.

ORDER

Therefore, for the reasons stated above, the Agency's decision to dismiss Appellant is REVERSED.

Dated this 5th day of August 2003

M. Gallegos

Michael S. Gallegos
Hearing Officer for the
Career Service Board