

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

Appeal No. 13-06

DECISION

IN THE MATTER OF THE APPEAL OF:

CATHRYN DIAZ,
Appellant,

vs.

DENVER ZOOLOGICAL FOUNDATION, DEPARTMENT OF PARKS AND RECREATION, and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on April 17, 2006 before Hearing Officer Valerie McNaughton. Appellant was present and represented by Donald Diaz. The Agency was represented by Assistant City Attorney Robert A. Wolf. Carole Flohr served as the Agency's advisory witness. Having considered the evidence and arguments of the parties, the following findings of fact and conclusions of law are entered herein.

INTRODUCTION

Appellant Cathryn Diaz is an Administrative Support Assistant II (ASA II) for the Department of Parks and Recreation (Agency) who is assigned to the Denver Zoo's Operations Department. Appellant appeals a four-week suspension imposed on February 2, 2006. The Agency's Exhibits 1 – 27 were admitted by stipulation, and Appellant's Exhibit F was admitted over objection.

FINDINGS OF FACT

The Agency suspended Appellant for four weeks based upon claimed performance issues which occurred from September to December 2005. [Exh. 1.] Appellant asserts that the discipline is contrary to Career Service Rules (CSR), discriminates against her based on her race, and constitutes harassment and retaliation.

Appellant serves as clerical support for Operations Supervisor Carol Flohr at the Denver Zoo Operations Department, the two-person unit that performs general

administrative duties for the zoo. Appellant distributes and handles paychecks, mail, petty cash, credit cards and radios, among her other responsibilities. [Testimony of Ms. Flohr; Exh. 13.]

The Agency bases its discipline on the following incidents:

1. Appellant gave another employee's paycheck to Dr. David Kemp on Sept. 15, and to Kim Pike on October 28, 2005,
2. Appellant did not lock up the petty cash on Nov. 21 and Dec. 1, 2005,
3. On Nov. 30, 2005, Appellant neglected to make a non-emergency radio call (an "all-call") to inform employees that Lew Keenan of Pest Control was at the zoo,
4. On Nov. 22, 2005, Appellant failed to obey Ms. Flohr's order to create a checklist of duties, and refused to discuss the matter with her until she had consulted with someone, thus delaying their discussion by one week,
5. Appellant was late fourteen times between Sept. and Dec. 2005, and
6. On Dec. 6, 2005, Appellant received a call on her cell phone, despite Ms. Flohr's order that Appellant's phone was to remain off during work hours.

The Agency claims that these incidents, when combined with past discipline, establish a pattern of unacceptable conduct, including failure to follow instructions, performance errors, and unwillingness to communicate with her supervisor.

Ms. Flohr imposed the four-week suspension after considering Appellant's previous work and disciplinary histories within the past three years, the latter including four verbal warnings, two written warnings, a one-day and a two-week suspension. [Exhs. 4 – 11.]

At hearing, Appellant admitted all of the above events with two exceptions: she believes she did make the all-call on Nov. 30th, and that she gave Ms. Flohr a list of her duties on Nov. 22nd. The Agency counters that Ms. Flohr made notes of those two events on her daily calendar on the day they occurred [Exh. 23, pp. 68, 70]. Ms. Flohr also testified that when she reminded Appellant to make the call, Appellant did so without stating she had already done it.

In support of her discrimination claim, Appellant testified that she is among the fewer than twenty Hispanic employees at the zoo, and that there are also very few African American employees. Appellant has heard Ms. Flohr refer to herself several times as the key or the uniform Nazi, and has heard her call Curator Rick Heffner "Herr Heffner". Appellant also stated that when Ms. Flohr started in Operations, she told Appellant and co-worker Michael Hernandez that it would be a difficult time to be

unemployed, which Appellant believed was an effort to get her to quit. Finally, Appellant and Eva Santorena, who is also Hispanic, were not offered the use of a work uniform, which caused Appellant to feel she was not treated as part of the staff. Ms. Flohr stated on rebuttal that the Operations Department has no budget for uniforms.

Appellant presented the testimony of co-worker Glenn Schultz, who stated he'd seen Ms. Flohr harshly reprimanding Appellant. Mr. Schultz said he believes Ms. Flohr was racist because she remarked to him two years ago, "How can you live among all these Mexicans? I'd sell the house and move out."

Michael Frank Hernandez testified by telephone. A few years ago, he hired Ms. Flohr as an on-call clerk. He recommended her for promotion to her current supervisory position, and he assumed a clerical position under her supervision. Mr. Hernandez is Hispanic and Yaqui Indian. He became concerned when Ms. Flohr objected to his screensaver featuring a picture of Indians with rifles. Mr. Hernandez noticed the relationship between Appellant and Ms. Flohr worsen over time, and that their discussions often became angry. Ms. Flohr commented to him and Ms. Diaz several times that it "[s]ure is a bad time to be out of work about now," which Mr. Hernandez believed meant Ms. Flohr was planning on firing them. Mr. Hernandez stated he eventually quit because of physical problems and the stress of working under Ms. Flohr.

Co-workers Eugene Roybal, Eva Santorena, Corey Steven Jeffries and Glenn Schultz all testified that Appellant performed tasks for them in a competent manner. Mr. Roybal and Ms. Santorena stated they must now ask Ms. Flohr if they want Appellant's help with certain tasks. Ms. Santorena feels Ms. Flohr may have discriminated against Appellant because Ms. Flohr had problems with another Hispanic employee, and also because Ms. Flohr raised her voice to Ms. Santorena and called her supervisor when Ms. Santorena's daughter failed to sign out after concluding her visit to her mother at the zoo.

On rebuttal, Ms. Flohr denied she made the comments as testified to by Mr. Schultz, and said Mr. Schultz told her he had been drinking on the day she brought her car to Mr. Schultz' house. Ms. Flohr admitted she has sometimes referred to herself as the uniform or the key Nazi, but explained that she meant only to indicate she was a stickler for rules. Ms. Flohr stated that Appellant did not tell her the word Nazi offended her. She explained that Mr. Heffner's mother is German, and as a result all the supervisors call him Herr Heffner, which means Mr. Heffner in English. After being advised of the translation of the word Herr, Appellant conceded that Ms. Flohr's use of the word "Herr" was not discriminatory. Appellant also testified that, after hearing Ms. Flohr's explanation, she no longer considered the use of the word "Nazi" as an indication of discrimination.

Ms. Flohr admitted she told Appellant and Mr. Hernandez it would be a bad time to be unemployed, but testified she meant it as a comment about the state of the economy which also applied to her, not a threat against their employment status.

ANALYSIS

I. Career Service Rules

In this de novo hearing on the appropriateness of the suspension, Agency bears the burden of proof to show by a preponderance of the evidence both that Appellant violated the disciplinary rules as alleged, and that the discipline was within the range of discipline that can be imposed under the circumstances. Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975.); In re Gustern, CSA 128-02, 20 (12/23/02).

A. CSR § 16-50 A. 1: Gross negligence or willful neglect of duty; and CSR § 16-51A. 6: Carelessness in performance of duties.

The Agency claims that Appellant was grossly negligent because her recent mistakes are a continuation of the same type of performance errors made over the past three years. Appellant admits she gave the wrong paycheck to two employees, twice failed to lock up the petty cash, and received a call on her cell phone when it should have been turned off. She also admits she was late a number of times. I find that Appellant also neglected to make the all-call on Nov. 30, 2006, and that on Nov. 22nd she failed to complete a list of her duties as she was instructed to do by her supervisor.

Appellant's duties were clearly defined and regularly reinforced. [Exhs. 13 - 22, 26 - 27.] Appellant was on notice of her duties and the standards by which her conduct would be measured. Appellant had been previously warned of and disciplined for the same types of conduct, including performance errors [Exhs. 4, 5, and 7], misuse of her cell phone [Exhs. 6, 11, and 12], tardiness [Exhs. 5, 8, and 9], insubordination [Exhs. 4 and 10], and failure to follow instructions [Exhs. 4, 5 and 6]. Based upon this evidence, I must find that Appellant's repetition of these errors over the course of four months was carelessness in the performance of her duties. See In re Diaz, CSA 92-05, 5 (1/31/05); In re Roberts, CSA 179-04, 3 (6/29/05). I do not find that the commission of those errors demonstrated the degree of irresponsibility needed to demonstrate gross negligence.

B. CSR § 16-50 A. 7: Refusing to comply with the orders of an authorized supervisor or refusing to do assigned work which the employee is capable of performing; and CSR § 16-51 A. 10: Failure to comply with the instructions of an authorized supervisor.

The Agency claims Appellant refused to obey her supervisor's orders to lock up the petty cash, create a list of her duties, and keep her cell phone turned off at work. Appellant admits these events, but claims they were not intentional refusals to obey orders.

Proof of violation of § 16-50 A. 7 requires a showing that the Agency communicated a reasonable rule to Appellant, and that she continued to violate the rule under circumstances demonstrating willfulness. See In re Conway, CSA 40-05, 3

(8/17/05). Proof of the intent to refuse compliance may be established by circumstantial evidence. See In re Owens, CSA 139-04, 7 (3/31/05).

The only issue under this rule is whether Appellant's actions demonstrated an intention to refuse to perform any of those duties. Appellant testified that she failed to lock up the petty cash on the first occasion because she acted automatically in placing the cash bag in the desk cabinet in which it used to be stored, and on the second occasion because there were people in Ms. Flohr's office, where the safe is located. She stated she gave Ms. Flohr an adequate list of her duties after being reminded once. Appellant explained that on Dec. 6th, she was distracted by a personal conversation and forgot to turn her cell phone off as she entered the building.

Appellant credibly testified that the above performance problems were not motivated by defiance of her supervisor's orders. The Agency admitted Appellant did not voice an intention to refuse any orders, but argued instead that these failures constituted a refusal to follow these orders on the indicated dates in the face of her past violations of these same rules. There was no evidence that the problems have recurred. I find that the Agency did not prove by a preponderance of the evidence that Appellant's actions demonstrated an intention to refuse to perform the work or disobey her supervisor as to the first three incidents listed above.

In order to establish a violation of § 16-51 A. 10, the Agency must prove that it gave Appellant reasonable notice of its instruction, and that Appellant failed to comply with that instruction. In re Martinez, CSA 19-05, 6 (6/27/05). The Agency established that Appellant failed to comply with her supervisor's instructions by virtue of the incidents in items 1 – 3 above.

The Agency also supported its allegation under the above rules by evidence that Appellant refused to talk about performance issues with Ms. Flohr on Nov. 22, 2005, and failed to comply with the work rule to turn her cell phone off on Dec. 6, 2005. On Nov. 22nd, Ms. Flohr made a note on her calendar that Appellant "became confrontational and refused to discuss directives and expectations w/ me. She said I was treating her like a child. She would talk to someone over her days off." [Exh. 23, p. 68.] Appellant has been disciplined in the past for similar behavior, and that discipline has been affirmed on appeal. In re Diaz, CSA 92-05, 7 (1/31/06). I find the Agency has proven Appellant intentionally refused to comply with her supervisor's reasonable order on Nov. 22, 2005, in violation of CSR § 16-50 A. 7.

E. CSR § 16-50 A. 13: Unauthorized absence from work; and
CSR § 16-51 A. 1: Reporting to work after the scheduled start time of the shift.

The Agency alleges that Appellant was late fourteen times between September and December 2005. Appellant admits being late, but argues that she was not required to fill out a leave slip unless tardy by over seven minutes.

The rule against unauthorized absence has been distinguished from that proscribing tardiness. Unauthorized absence is grouped with more serious offenses under CSR § 16-50, Causes for Dismissal, and has been found when an employee disobeyed his supervisor's order to call him during extended sick leave, and when an employee took a nap during work hours. In re Conway, CSA 40-05 (8/16/05); In re Owens, CSA 139-04 (3/31/05). Tardiness is violated when an employee arrives late for the start of a shift. CSR § 16-51 A. 1. The rules properly differentiate among various types of absences, as the employer is affected differently by late arrivals than by abuse of leave, unauthorized absences or failure to report for work. See also CSR §§ 16-50 A. 12; 16-51 A. 3.

The evidence indicates that all fourteen of the charged absences were a failure to report to work by Appellant's start time rather than any other kind of absence. The Agency has proven a violation of CSR § 16-51 A. 1.

F. CSR § 16-51 A. 2: Failure to meet established standards of performance

The Agency did not submit any evidence in support of this allegation, and no violation is otherwise apparent. It is determined that the violation is not established by a preponderance of the evidence.

G. CSR § 16-51 A. 4: Failure to maintain satisfactory working relationship with coworkers, other City and County employees or the public.

The Agency claims that Appellant refused to communicate with her supervisor if she believes Ms. Flohr has emotionally escalated a discussion into an argument. Appellant admitted that for the past two years she has spoken to her supervisor only when she needs to, and will terminate a discussion and request a representative after a certain line has been crossed in the conversation. When asked where that line was, Appellant replied that she believes her supervisor is aware when it is crossed. In the incident that led to this charge, Appellant reacted to her supervisor's reminder to finish a task by stating that she would not discuss the issue until she spoke with a representative because Ms. Flohr was treating her like a child. As a result, the matter did not get resolved for another week.

Appellant has been disciplined for the same and similar behavior during the past two years. [Exh. 4, p. 3; Exh. 10, p. 2.] This is an untenable working situation in a two-person office which requires coordination between the two in order to do the work of the unit. The Agency has established that Appellant has failed to maintain a satisfactory working relationship with her supervisor.

II. Discrimination and Harassment Claims

Appellant claims that the suspension discriminated against her on the basis of her race, Hispanic, and that the suspension constituted harassment. Appellant carries the burden to prove the discrimination claim by persuasive evidence that she is a

member of a protected class, and that the suspension was motivated by discrimination.

Appellant and three co-workers presented testimony in support of this claim. Appellant believes Ms. Flohr discriminates because she used the words "Nazi" and the German word "Herr" in the workplace, and because she was not offered a uniform. Glenn Schultz said Ms. Flohr told him two years ago that she would not live near Hispanics. Eva Santorena stated she believes Ms. Flohr is racist because she had problems with another Hispanic employee, and once raised her voice to her. Mr. Hernandez testified he became concerned about Ms. Flohr's attitude toward Hispanics when she criticized a screen-saver picture of Indians.

Ms. Flohr admitted using "uniform Nazi" or "key Nazi" to describe herself, but said if Appellant or anyone had complained, she would have ceased to use it. Appellant admitted the word "Herr", translated as "Mister", is not objectionable. The failure to offer a uniform was adequately explained based on business reasons, and in any event is not racial in nature.

The most direct evidence presented on the issue of discriminatory intent was that of Mr. Schultz. Its credibility was greatly undermined by his failure to report the remark until the hearing in this appeal, two years thereafter, despite opportunities to do so. In re Schultz, CSA 156-04, 5-6 (6/20/05). The remaining witness testimony does not meet the burden to establish that the suspension was motivated by discrimination, or that Appellant worked in a hostile or abusive atmosphere. No other evidence was presented on the issue of discrimination, and none appears of record. The claim is therefore denied as unfounded.

III. Retaliation Claim

In order to prove retaliation, Appellant must submit evidence that she engaged in a protected activity such as a report or complaint of discrimination, and that the suspension was motivated by a desire to punish her for that activity. CSR § 15-106; Poe v. Shari's Mgmt. Corp., 1999 US App LEXIS 17905 (10th Cir. 1999).

Appellant presented no evidence in support of this claim. I take administrative notice that Appellant has filed previous Career Service appeals. In re Diaz, CSA 28-05; 45-05. The evidence does not indicate any causal connection between those appeals and this disciplinary action. The retaliation claim is denied as unproven.

IV. Penalty

Appellant contends that the four-week suspension is too harsh for the minor performance problems she had over the four months, and that her supervisor bears some of the responsibility for the poor communication between them. The Agency counters that, given extensive previous discipline for the same type of conduct, the

penalty was tailored to send the message that Appellant must turn her conduct around, since previous milder discipline did not have the desired effect.

The Career Service Rules require progressive discipline to correct inappropriate behavior or performance. Discipline must be reasonably related to the seriousness of the offense, and appropriate to correct the situation and achieve the desired change in behavior or performance. CSR § 16-10.

Given the extensive discipline already meted out for almost identical violations, I find that the discipline was within the range of discipline that could be imposed by a reasonable administrator.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Hearing Officer AFFIRMS the Agency action dated February 2, 2006.

Done this 31st day of May, 2006.


Valerie McNaughton
Hearing Officer for the
Career Service Board

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party may petition the Career Service Board for review of this decision in accordance with the requirements of CSR § 19-60 et. seq. within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of mailing below. The Career Service Rules are available at [www.denvergov.org/csa/career service rules](http://www.denvergov.org/csa/career%20service%20rules).

All petitions for review must be filed by mail, hand delivery, or fax as follows:

BY MAIL OR PERSONAL DELIVERY:

Career Service Board
c/o Employee Relations
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

BY FAX:

(720) 913-5720

Fax transmissions of more than ten pages will not be accepted.