HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 26-16

DECISION AND ORDER

ANGIE LEE, Appellant,

v.

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

The hearing in this appeal was held on January 27, 2017 before Hearing Officer Valerie McNaughton. Appellant represented herself, and Assistant City Attorney Sherri Catalano appeared for the Agency, with Christian Maddy serving as Agency advisory witness. Christian Maddy and Joy Brown presented testimony for the Agency. Christy Marquez, Lori Noble, and Stephen Lyles testified on behalf of Appellant.

I. STATEMENT OF THE APPEAL

Appellant Angie Lee challenges the disciplinary temporary reduction in pay imposed by the Department of Human Services on Oct. 26, 2016. The parties stipulated to the admission of all exhibits, which are Agency Exhs. 1 – 7 and Appellant Exhibits A – I. Exh. J was admitted at the hearing.

II. FINDINGS OF FACT

Appellant was hired by the Agency in July, 1992, and has been an Operational Supervisor I in the parental fee unit which handles fees for foster care since April 6, 2008. That unit was located in the Financial Services Division until its transfer to Child Support Services in May, 2016.

Appellant and her new supervisor in Child Support Services, Christian Maddy, meet weekly to review ongoing work and projects. On June 15, 2016, Appellant informed Maddy that she met daily with one of her technicians, Luann Booth, to quality-check her work pursuant to a Performance Improvement Plan (PIP). The following week, Maddy ordered Appellant to draft an amended 90-day PIP for Booth with an end date of Sept. 30, 2016, for OHR's review. The amended PIP was delivered to Booth on July 1st. Appellant submitted written and verbal progress reports on Booth at her weekly meetings with Maddy, which showed Booth was achieving only minor improvements. [Exh. 4-2.]

On Aug. 24, 2016, Maddy directed Appellant to prepare a pre-disciplinary letter for review by the Division Director on Tuesday, Sept. 6, 2016. Appellant was scheduled for a mandatory training class on the morning of Sept. 6th. That day was also the deadline for Appellant to submit an offer letter for her Technician II vacancy, and her deadline for

submitting amended Performance Enhancement Plans (PEPs) for her other staff. Maddy gave her an extension on the latter task. Appellant attended the training and submitted the offer letter to OHR, but did not meet her deadline to deliver the pre-disciplinary letter draft to Maddy. [Exh. 4-3.]

On Friday, Sept. 9th, Maddy asked for the draft letter. Appellant told him that she would have it to him before she left for the day. The parties stipulated that Appellant sent it to Maddy by email on Sept. 9th at 11:46 am. [Exh. I.] Maddy did not receive it in his inbox until Sept. 12, 2016.

Agency personnel may determine and modify child support orders without a judicial hearing if they hold an Administrative Process Action (APA) certification based on the Colorado Child Support Guidelines. At their June 23, 2016 one-on-one meeting, Appellant asked Maddy if it was necessary for her to keep her certification active, since the APA caseload could be covered by her technicians, both of whom are certified. Maddy replied that it was a requirement. The Division Director confirmed at hearing that it is standard practice in the Child Services Division to require supervisors to maintain the same qualifications as the staff they supervise. [Brown, 10:05 am.]

Appellant then contacted Robert Kurtz at the Colorado Division of Child Support Services, who informed her that her three-year certification had expired in late April, but that she could take the recertification test upon a request from Division Director Joy Brown. Ms. Brown made the request, and Appellant was emailed the test for return no later than Aug. 5, 2016. Appellant submitted the test on Aug. 3rd, and was informed on Aug. 8th that she had passed effective Aug. 3rd, with no lapse in her APA certified status. [Exh. 4-5 to 4-8.] At hearing, the Agency stipulated that Appellant did not seek an extension to submit her test, and that she passed the test on Aug. 3, 2016.

Appellant was served with a pre-disciplinary letter on Oct. 5, 2016 based on allegations that she failed to maintain her required APA certification, failed to manage Booth's performance issues, and submitted the draft pre-disciplinary letter after the due date set by her supervisor. [Exh. 3.] The letter stated that Appellant asked the state for an extension from Aug. 3rd to Aug. 5th to submit her test without Maddy's knowledge, and passed the test on Aug. 5th.

Appellant furnished a written response. She informed the Agency that APA certification was not a requirement in her PEP, her previous supervisor had not required it, and she was not aware Maddy wished her to maintain it until she asked him about it at their June 23rd meeting. Appellant attached copies of the emails to and from the Colorado Division of Child Support Services, which showed that Appellant was given until Aug. 5th to submit her test responses, and that she did so and passed on Aug. 3rd. Appellant also noted that the open-ended PIP for Booth had been approved by OHR and her former supervisor, and that she continued to provide daily oversight, feedback and corrections to Booth, as well as weekly detailed reports to Maddy. Appellant admitted her draft letter was late, but stated it was delayed by three days, not six, as alleged in the pre-disciplinary letter. [Exh. 4.]

The Agency decision-maker was CSE Division Director Joy Brown. She found the facts as stated in the pre-disciplinary letter, and determined that Appellant permitted her APA certification to lapse, allowed a PIP to continue indefinitely, and failed to respond to

her supervisor's deadlines. Based thereon, Brown concluded that Appellant neglected work duties, failed to obey orders, failed to meet performance standards, and damaged her relationship with her supervisor. Director Brown determined that the equivalent of a five-day suspension was appropriate, but the penalty would be converted to a 12.5% pay reduction for four pay periods based on business needs. [Exh. 5-4; 6.]

III. ANALYSIS

The Agency bears the burden to establish the asserted violations of the Career Service Rules by a preponderance of the evidence, and to show that a 12.5% pay reduction for four pay periods was within the range of discipline that can be imposed for the proven violations. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); In re Lovingier, CSB 48-13, 3 (11/7/13).

A. VIOLATION OF DISCIPLINARY RULES

1. Neglect or carelessness, CSR § 16-29 A.

This rule prohibits a failure to perform a known duty as well as poor performance of a duty. *See* In re Fresquez, CSA 63-16 (2/24/17).

The Agency first claims that Appellant neglected her duty by permitting her APA certification to expire in April, 2016. Appellant's PEP shows that her 2016 duties as Operational Supervisor I include planning, personnel, supervision, and operational functions. It does not state that Appellant is required to possess any certifications necessary to perform technical functions. [Exhs. 5-6; 7; C-9.] Appellant's prior supervisor confirmed that the certification was not in her PEP and was not needed to handle the caseload. [Marquez, 10:59 am.] Appellant promptly raised the issue with her new supervisor, and obtained the certification without a lapse in her certified status once informed it must be kept active. The Agency stipulated at hearing that Appellant had not requested an extension, and had passed the test on Aug. 3, 2016. The Agency failed to prove that Appellant neglected a known duty, or that she was careless in her duty to re-test after learning her new supervisor required it.

Next, the Agency found Appellant allowed Booth's PIP to continue indefinitely, in violation of her duty to manage performance issues in her direct reports. Maddy was concerned that Booth's PIP had no end date, since in his two years with the city he had never seen one last this long. However, the open-ended PIP was issued in Nov. 2015, when Appellant's unit was under the Financial Services Division. Because Booth had received below expectations reviews for at least the previous two years, the issues and options were discussed in detail. Appellant's direct supervisor, Division Director and OHR staff all supported and approved the strategy of the open-ended PIP in a conscious effort to stabilize Booth's fluctuating performance. [Marquez, 10:10 am; Noble, 11:35 am.] During the PIP, Appellant met with Booth daily, provided training, checked and corrected her work, adjusted her assignments, documented each accomplishment and error in detail, made changes to her desk and workflow, and gave her a weekly progress report. [Exh. H-1 to H-17; Marquez, 11:01 am.] After one technician resigned, Appellant spent significant time with Booth to improve her performance and attempt to avoid errors until that vacancy could be filled. [Exh. G.] Appellant's weekly calendars show numerous meetings and candidate interviews. [Exh. E.] The records of Appellant's

weekly meetings with Maddy list several projects and reports, as well as notes indicating that Appellant filled in for staff members on leave. [Exh. A-1 to A-13.] "It was an exhausting task day after day." [Exh. 4-4.] Ultimately, the employee was separated. [Maddy, 8:48.] The Agency presented no evidence in rebuttal. I cannot conclude that Appellant was negligent or careless in her responsibility to monitor and improve the performance issues of her staff member.

Finally, the Agency claims that Appellant neglected her duty to meet her supervisor's Sept. 6, 2016 deadline for submittal of Booth's pre-disciplinary letter. On Aug. 24th, Maddy directed Appellant to submit her draft letter to him by Sept. 6th. That gave Appellant eight working days to obtain advice from OHR and produce the letter. A total of eight hours was consumed by interviews and reference checks for the staff vacancy. Another six hours were spent in meetings with Maddy and Booth, and Appellant was on leave for about five hours. An unknown amount of time was spent covering the unfinished work caused by a four-month vacancy and closely supervising Booth. That leaves some time, certainly less than 45 hours, to complete the task. Appellant admits she did not submit the letter by Sept. 6th, and did not contact Maddy to request an extension or advise him it would be late. Based on the Agency's stipulation, it is undisputed that the work was delivered on Sept. 9th, three days after the deadline. Appellant was careless in her obligation to meet her supervisor's deadline or communicate with him about the status of the work, in violation of this rule.

2. Failure to comply with order or complete assigned work, CSR § 16-29 F.

Disobedience to an order under the first part of this rule requires some evidence demonstrating an intentional refusal to comply with a supervisor's authority, an act much different and more significant than mere neglect. See In re Macieyovski, CSA 28-14, 6 (10/13/14), *citing* In re Mounjim, CSB 87-07 (1/8/09)(decided under the identically worded former rule, CSR § 16-60 J.)

Under this portion of the rule, the Agency argues that Appellant failed to obey her supervisor's order to draft and submit the Booth pre-disciplinary letter by Sept. 6, 2016. It stipulates that Appellant emailed the draft to Maddy on Sept. 9th at 11:46 am. While Appellant admits her draft was late, there is no evidence to support a finding that Appellant intentionally refused to complete the work. She had been granted an extension in other work set for delivery that same day. Appellant told Maddy on Sept. 12th that she had "spaced" the task, citing many other duties. [Exh. 5-3.] Once reminded of it, Appellant stayed an extra hour to finish the task, even though she had been granted permission to leave at 11 am that day. These are the acts of a supervisor who acknowledged her mistake and conscientiously sought to meet her manager's expectations, not one who willfully refused to comply with an order. The Agency did not prove Appellant disobeyed an order by virtue of her late submittal of an assignment.

The second portion is violated by a failure to complete assigned work. In order to be consistent with the seriousness of the first section, this allegation requires proof that an employee failed to do the work at all, not, as here, where she completed the work three days after the deadline. In re Perry-Wilborne, CSA 62-13 (5/22/14). There is no showing that the Director was unable to review the draft because it was late, or that the pre-disciplinary letter was not issued. In fact, Booth was terminated as a result of

the disciplinary process initiated by Appellant's draft letter. As a result, the Agency failed to prove a violation of either portion of this rule.

3. Failure to meet established performance standards, CSR § 16-29 G.1

This rule requires an agency to cite the specific qualitative or quantitative standards an employee failed to meet, such as the standards to be found in a performance evaluation. In re Mestas et al., CSA 64-07 (5/30/08) (decided under former rule § 16-60 K). General duties or broad performance expectations are not performance standards under this rule. In re Gutierrez, CSB 65-11, 3 (4/4/13). The PEP cited in support of this violation falls into the latter category: a recitation of general supervisory duties, with no specific outcomes or goals. [Exh. 5-6.] Thus, the same shortcomings cited above as neglect, carelessness and failure to perform assigned work do not allege or prove that Appellant failed to meet an established performance standard.

4. Failure to maintain satisfactory work relationships, CSR § 16-29 I.

The rule is violated in relevant part by conduct an employee knows or should know will have a significant negative impact on a working relationship. In re Burghardt, CSB 81-07, 2 (8/28/08). Such impact need not be permanent, and must consider all the evidence showing the effect of the misconduct on working relationships. *See* In re Novitch, CSB 49-15, 3 (9-15-16.) The Agency found that Appellant's relationship with her supervisor was damaged as a result of her conduct, and also that Appellant did a disservice to Booth by extending her PIP for so long.

The only rule violation proven at hearing was that Appellant was careless in performing her duty to submit a draft pre-disciplinary letter to her supervisor by Sept. 6th. The disciplinary letter strongly emphasized that Appellant's actions contributed to "a pervasive culture of unaccountability [and] put a strain on our relationship because I am frustrated that my directives … require a disproportionate amount of follow-up". [Exh. 5-3.] At hearing, however, it became clear that Maddy was mistaken about the APA certification, and was not aware that Appellant submitted her draft on Sept. 9th before she left work. If Maddy had known of the facts as stipulated to by the Agency, he could not reasonably have considered this one violation a pattern of misconduct. Any strain between them would have been limited to the few days between Sept. 9 and 12th, and ended on the 12th when Maddy would have discovered that Appellant did indeed turn in the work on Sept. 9th after his second request.

Other evidence supports this finding. After their Sept. 12th meeting, well before the pre-disciplinary letter was delivered, Maddy noticed that Appellant was consistently meeting with him about approaching deadlines, and submitting her work early and "in very good shape." [Maddy, 9:04 am.] Maddy did not testify to any strain in their current working relationship. Another technician testified that the four-month vacancy, increased caseload, and the move from Financial Services did cause stress and additional work, but they were always able to adjust work to meet client needs. [Lyle, 11:40 am.] The evidence showed it was more likely that the changes caused by the move and new expectations, Booth's PIP and a long staff vacancy combined to cause the strain noted in the disciplinary letter, not the alleged misconduct of Appellant, most of which was unproven.

Throughout the disciplinary and appeal processes, Appellant's communications have been respectful, even when disputing the asserted facts. Division Director Joy Brown testified with "no reservations" that Appellant "handled the situation professionally." Appellant continues to be welcoming to her, and is "competent in working through reports for her team." Appellant contributes at meetings, and has participated in training to increase her writing skills. [Brown, 10:17 am.] Maddy freely testified that Appellant has improved in meeting his expectations. "Christian and Angie have continued to develop rapport", observed the Division Director at hearing. [Brown, 10:21 am.]

The Agency also alleged that Appellant's open-ended PIP for Booth "did a disservice" to Booth, who "deserved the opportunity to have corrective action taken … if she was in the wrong seat within our organization." [Brown, 10:17 am.] Brown found that Appellant "should have been using HR to move [Booth] through the disciplinary process". [Brown, 10:05 am.] Brown was not aware that OHR had been consulted by Financial Services' management prior to commencement of Booth's PIP, and that OHR and management were in agreement with the strategy given the circumstances, including Appellant's active monitoring of Booth's performance and Booth's own history of improvement followed by relapse. There was no evidence that Booth resented the long PIP, which gave her an additional period to improve, and more tools with which to accomplish improvements. In sum, the Agency failed to prove Appellant's sole careless act in September caused a negative impact on her working relationships with either Maddy or Booth.

IV. PENALTY DETERMINATION

The evidence proved that Appellant was careless in failing to submit an assignment to her supervisor in a timely manner. Since the penalty imposed by the Agency was based on two additional factual findings and three other sustained rule violations, the penalty must be reconsidered in light of the facts as found at hearing.

Appellant admits that she failed to deliver the pre-disciplinary letter on the date it was due, three days before it was actually submitted. She presented evidence about other work she completed that indicates this particular time was an especially busy one for her, as Appellant hurried to fill a vacancy and amend her staff PEPs. Appellant received a written reprimand in 2013 for failure to report to work. The evidence shows that Appellant improved on her own, even before the pre-disciplinary letter was delivered or the reduction in pay was imposed. This indicates that Appellant is motivated by her own desire to meet performance expectations. In any event, some discipline above a written reprimand is necessary to reinforce the message that the flow of work must be met when possible, and when impossible, the supervisor must be kept informed.

In light of the proven violation and all the evidence, the Agency's decision to impose the equivalent of a five-day suspension for an isolated act which resulted in no proven harm to Agency operations or relationships, and for behavior which was immediately corrected by Appellant after demonstrating remorse is clearly erroneous, and not within the range of alternatives available to a reasonable and prudent administrator. In re Archuleta, CSB 45-15A, (10/7/16); *see also* In re Economakos, CSB 28-13A (3/27/14). Because the nature of the misconduct calls for something beyond a

written reprimand, a temporary reduction in pay equivalent of a one-day suspension is a penalty reasonably related to the seriousness of the conduct, and proportionate to that needed to achieve the desired performance.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, the penalty is MODIFIED to a temporary reduction in pay equivalent of a one-day suspension.

Dated this 3rd day of March, 2017.

Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You 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 decision's certificate of delivery. See Career Service Rules at www.denvergov.org/csa. **All petitions for review must be filed with the:**

Career Service Board
c/o OHR Executive Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: CareerServiceBoardAppeals@denvergov.org

Career Service Hearing Office
201 W. Colfax, Dept. 412, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND opposing parties or their representatives, if any.