

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

Appeal No. 114-02

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

ANNEESAH NNUNUKWE, Appellant,

v.

Agency: Department of Safety, Denver Sheriff Department and the City and
County of Denver, a municipal corporation.

INTRODUCTION

For purposes of this Order, Anneesah Nnunukwe shall be referred to as "Appellant." The Department of Safety, Denver Sheriff Department 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 November 15, 2002, before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant was present and was represented by Cheryl Hutchison, AFSCME. The Department and City were represented by Robert D. Nesor, Esq., Assistant City Attorney, with Fred J. Oliva 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:

Major Victoria Connors, Sergeant Elizabeth Butts, Undersheriff Fred J. Oliva

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

Appellant

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

Exhibits 1 - 8

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

Exhibits A (pp. 1 - 3), C, D, F, G (pp. 3, 4, 11, 14, 24)

The following exhibits were admitted into evidence by stipulation:

Exhibits 1 - 8, A (pp. 1 - 3), C, D, F, G (pp. 3, 4, 11, 14, 24)

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

None

NATURE OF APPEAL

Appellant is appealing a written reprimand for alleged violations of CSR §§16-51 A. 5), 6), and 10),¹ issued on May 3, 2002. She is requesting that the written reprimand be reversed and removed from her personnel file.²

ISSUES ON APPEAL

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

Whether Appellant violated CSR §§16-51 A. 5), 6) and 10)?

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

PRELIMINARY MATTERS

None.

FINDINGS OF FACT

1. During the relevant period, Appellant was the Safety and Loss Analyst for the Denver Sheriff Department. She has worked for the Department for eleven years. She became the Safety and Loss Analyst in December 1999. At that time she worked directly under Undersheriff John Simonet. After Mr. Simonet retired, Undersheriff Fred J. Oliva became her direct supervisor. On December 5, 2001, Sergeant Elizabeth Butts and Captain Craig Meyer were given the responsibility to supervise Appellant.

2. The chain of command at the County Jail under which Appellant was working after December 2001 was, in descending order, Division Chief Robert Maher, Major Victoria Connors, Operations Major at the County Jail, Capt. Meyer and Sgt. Butts.

3. When Sgt. Butts and Capt. Meyer assumed responsibility over Appellant, they met with her and gave her an "Outline of Duties and Expectations Safety/Loss Analyst December 2001." ("Outline of Duties") (Exhibit A, pp. 1-3) This document was the initial presentation of her job duties until a revision, with input from Appellant, could be prepared.

¹ The Written Reprimand cites the number of this alleged violation to be CSR §16-51 A. 7) and then recites the text of CSR §16-51 A. 10). The evidence adduced during the hearing was regarding Appellant's failures to comply with the instructions of her supervisors, not her unauthorized use of City equipment. The Hearing Officer concludes that the citing of the wrong number is merely typographical and holds it to be harmless error.

² In the Notice of Appeal, Appellant also asked for a job description and a new PEP plan. Appellant did not pursue these "remedies" during the hearing. As Appellant has a new position, this issue is moot, in any case.

4. Appellant described her job duties as conducting ergonomic evaluations and making recommendations when the Department was out of compliance. She was responsible for ensuring compliance with Executive Order No. 65, which established the Occupational Safety Program, which is based upon Occupational Safety and Health Administration guidelines. She was also responsible for the inspection of inmate housing to ensure that chemical containers and other hazardous material was properly stored. The Outline of Duties provides a similar job description.

5. According to the Outline of Duties, recommendations based upon findings after Appellant performed evaluations of workspace/areas for ergonomic and safety needs were to be routed through the Life Safety Officer, who was previously identified in the Outline of Duties as Sgt. Butts. (Exhibit A., p. 1)

6. The Outline of Duties provides:

The Chain of Command within the Denver Sheriff Department is well delineated and exists for the physical, civil and legal protection of staff, inmates and public. It is imperative that the Safety and Loss Analyst understand and respect the operation of the Chain of Command; and the possible consequences of failing to work within established guidelines and procedures. Sgt. Butts will provide answers to any questions in this area...

7. Appellant testified that, during the relevant period of time, she was not made aware of the "chain of command." According to her, it was not explained to her until May 9, 2002. Sgt. Butts testified that the chain of command was explained to Appellant in December 2001.

8. Appellant stated that, in December 2001, Capt. Meyer told her that she was to continue to perform her duties and just to give Sgt. Butts copies of all her reports. She denied that she had ever been told to go through Sgt. Butts for approval to perform any evaluations.

9. Sgt. Butts is the fire-life safety officer for the Department. She has been handling occupational safety issues for the Department for 5 years. She has additional experience in the military and at Denver International Airport. She is an OSHA instructor for the State of Colorado. She was one of the first people to be certified by the National Fire Protection association as a Fire Inspector.

10. In April 2002, Rev. John Scott, the chaplain at the County Jail, requested his workstation be evaluated. According to Appellant, Rev. Scott came to her office to complain about his chair, which was in poor condition, and computer desk, which bumped his knees. Appellant told him to write to his supervisor and that when it came back to her, she would do the evaluation.

11. According to the Department's witnesses, Rev. Scott's duties take him into the main Jail and that he spends little time at his desk in his office. Maj. Connors described his time in his office was for "dropping off his coat and storage." Appellant stated that she never asked Rev. Scott about the amount of time he spent in his chair at his desk or at the computer.

12. On April 29, 2002, Maj. Connors replied to Rev. Scott's request. She wrote:

As you have noticed, the RFMS Unit has recently vacated the areas where your office is also located. There are plans in the near future to rearrange and reallocate all of the work spaces along the entire corridor behind the CV room where you and Ms. Holmes currently office. After those moves are completed, it has been our plan to re-furnish the newly created office space. It is not prudent to evaluate your office immediately because the entire area is being re-planned and your office may or may not be located in the same place in the future.

So, you can be sure that we have in mind the issue you've raised and will ensure that it is addressed at the earliest possible time.

(Exhibit 2)

Appellant, as well as Sgt. Butts, were "cc'd" on the memo.

13. On May 1, 2002, Appellant responded to Maj. Connors' memo. She wrote:

I received a copy of the memorandum sent to Dr. John Scott, dated April 29, 2002. Your explanation of what is being planned in the near future is well taken. The main concern is that to deny Rev. Scott's request is not logical and noting it as "not prudent" is out of compliance as it is something that has been brought to our attention.

As you are aware, City agencies follow the Occupational Safety and Health Act of 1970 via Executive Order No. 65. We are responsible for the safety of our employees:

1. Policy No. 1 page 3 "Provide for safe and healthful working conditions for all City Employees, Safety Management No. 1 "Compliance with the Occupational Safety and Health Act (OSHA) of 1970" (sic)
2. Section 2) page 4
 - A) "Furnish to each worker employment and a place of employment which are free of recognized hazards that may cause or are likely to cause death or serious physical harm"
 - E) "Acquire, maintain, and require the use of approved person protective equipment, approved safety equipment, and all other devices necessary to protect employees."

Because of my position as a Safety and Loss Analyst for our Denver Sheriff Department, I am compiled (sic) to evaluate situations as they are reported and/or made known to me. Therefore, I will be evaluating Rev. Scott's workstation to rule out any potential health and safety hazard. I will provide information on findings and recommendations.

Thank you for your concern.

(Exhibit 3)

A copy of the memo was "cc'd" to Sgt. Butts

14. Appellant performed the workstation evaluation of Rev. Scott's office on May 7. She found that, among other things, his chair rated very poor for posture and that the leg space under his desk was inadequate. She concluded that the work equipment and office furnishings were hazardous to Rev. Scott's physical well being and recommended that proper furnishings and equipment be provided immediately. She issued the report on May 7. (Ex. D)

15. After Maj. Connors received Appellant's memo to her, Sgt. Butts, on May 3, began a written reprimand for Appellant for failing to route all correspondence through Appellant's immediate supervisor (*i.e.*, Sgt. Butts). She was reminded that she had been told in December, and at subsequent times, that she was to send all correspondence through Sgt. Butts and not directly to a major, captain or chief. By the time Sgt. Butts completed the written reprimand a few days later, Appellant had completed the evaluation of Rev. Scott's office.

16. The Written Reprimand provides, in part:

You have disobeyed a direct order by preparing an evaluation when it was clearly stated by Major Connors that said evaluation was to occur after the office change. You evaluated a room and furnishings that are already slated for replacement. This is a willful waste of City time and resources.

Department regulation 200.12 states that **Deputy Sheriff and employees will not disobey, neglect, or refuse to obey, any lawful order of a supervisor.**

Section 16-50 of the Career Service Rules states that **Refusing to comply with the orders of an authorized supervisor or refusing to do assigned work which the employee is capable of performing** is cause for dismissal.

Section 16-51 of the Career Service Rules state that Progressive Discipline may be initiated for:

- 5) **Failure to observe departmental regulations**
- 6) **Carelessness in performance of duties and responsibilities**
- 7) **Failure to comply with the instructions of an authorized supervisor³**

In addition, you attempt to state that the Major was out of compliance by delaying the evaluation was insubordinate and disrespectful.

DSD Rule 200 14 states that **Deputy Sheriffs and employees shall not willfully or intentionally display any disrespectful, insolent or abusive language or behavior towards any superiors, Department employee, employee of other official agencies or the public, while on duty.**

Major Connors has years of experience and does not need to be educated on Health And Safety Issues (sic) by an entry level employee,

³ See Fn. 1. The correct provision citation is CSR §16-51 A. 10), not CSR § 16-51 A. 7).

particularly when the policies you cite are misquoted or taken out of context. "Personal Protective Equipment" does not apply to office furniture, but is a term that specifically applies to actual safety equipment such as protective gloves, masks, etc. Keeping a work area "free of recognized hazards" is an ongoing process that requires input from the employee and can most often be resolved quickly and easily. Rev. Scott did not notify his supervisor of any questions or concerns. Had he done so, or had you notified your own supervisor, appropriate action would have been taken. The only immediate concern or possible hazard was the office chair. Once I talked to Rev. Scott, I made immediate arrangements for his chair to be replaced. This is a simple matter and can usually be accomplished the same day. New ergonomic furnishings for the new office, as well as several other offices that have been earmarked, are already being planned.

Had you discussed this with your supervisor, you would have been given this information and Mr. Scott would have received his replacement chair right away. Instead, you flaunted departmental policy, wasted much of your own time and others, and delayed the employee from getting his safety issue resolved. This action on your part is unacceptable.

(Exhibit 4, emphasis in original)

17. Sgt. Butts testified that she failed to change the date of the Written Reprimand from May 3, when she started it, to the date she actually completed it and gave it to Appellant. According to the Grievance Form, Appellant gives May 9 as the date of the "action."

18. Appellant filed her grievance with Sgt. Butts on May 15, 2002. (Exhibit 5) Sgt. Butts denied it on May 21. (Exhibit 6). Appellant filed the second step grievance with Mr. Oliva on May 30, 2002. (Exhibit 7). Mr. Oliva denied it on May 30. (Exhibit 8)⁴

19. Appellant filed her notice of appeal with the Hearing Officer in a timely manner on June 6, 2002.

20. Appellant testified at the hearing that she did the evaluation despite Maj. Connors indicating that it would not be done because she felt it was in the best interest of the Department and that it was mandatory for her to do it under Executive Order 65. She said that she did not mean to be disrespectful toward Maj. Connors. She felt that her memo to Maj. Connors was meant to raise "examples" that she was not sure that Maj. Connors had considered. She also stated that she felt that if she hadn't done something about the situation, she could have been in trouble had Rev. Scott been injured. Appellant acknowledged that Maj. Connors did not want to have the evaluation performed, by that she decided to do it anyway since it was in the best interest of the Department.

⁴ Mr. Oliva testified that the date on the denial of the grievance, May 3, is a typographical error. Appellant date stamped the denial and wrote a note that it was hand delivered to her at 2:45 p.m. on May 30.

DISCUSSION AND CONCLUSIONS OF LAW

Applicable Rules and Statutes

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 §16-51, 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.

- 5) Failure to observe departmental regulations.
- 6) Carelessness in performance of duties and responsibilities.
- 10) Failure to comply with the instructions of an authorized supervisor.

CSR Rule 18 covers the procedures for grievance. It provides, in relevant part:

§ 18-12 Grievance Procedure

If work related dispute was not resolved through alternative dispute resolution or if alternative dispute resolution was not previously attempted and a career service employee has a grievance as defined in Section 18-10(a) of this rule, the employee may file a grievance according to the following procedures:

1. Form: The grievance shall be presented in writing and shall be dated. It shall include the name and address of the grievant, the action which is the subject of the grievance, the date of the action, and a statement of the remedy sought. The grievance form shall have a certificate of mailing or a certificate of hand delivery which indicates the date the grievance was placed in the mail or was hand delivered to the immediate supervisor.
2. Filing with Supervisor: The employee shall present a grievance to the immediate supervisor within ten (10) calendar days after notification of the action which gives rise to the grievance. The supervisor shall consider the grievance and within ten (10) calendar days give the employee dated, written notice of a decision....
3. Filing with Agency Head: If the response of the immediate supervisor does not resolve the grievance and the employee wishes to pursue the grievance further, employee shall present the grievance to the head of the agency, or designee, in writing within ten (10) days) after receiving the decision of the immediate supervisor....

If the immediate supervisor has not responded to the grievance within ten (10) calendar days and the employee desires to pursue the grievance further, the employee must present the grievance in writing to the head of the agency or designee no later than ten (10) calendar days after the supervisor's response was due....

The head of the agency or designees shall consider the grievance and shall give the employee dated, written notice of a decision within ten (10) calendar days from the date contained on the certificate of mailing or certificate of hand delivery....

4. Filing with Career Service Authority: If the employee still feels aggrieved after receipt of this decision, or the agency head has not responded within ten (10) calendar days, and the grievance concerns an alleged violation of Charter provisions relating to the Career Service, ordinances relating to the Career Service, or the Career Service Rules, and the employee wants to pursue the grievance further, the employee must appeal to the Hearings Officer of the Career Service Board in accordance with the provisions of RULE 19 APPEALS....

part: CSR Rule 19 concerns appeals before the Hearing Officer. It provides, in relevant

§19-10 Actions Subject to Appeal

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel:

- d) Grievances resulting in rules violations: Any grievance which results in an alleged violation of the Career Service Charter Amendment, or Ordinances relating to the Career Service, or the Career Service Personnel Rules. The grievance must be in conformance with and processed pursuant to the requirements of Section 18-12 Grievance Procedure. The appeal form must state with specificity which career service charter amendment, ordinance or career service rule(s) are alleged to have been violated. An appeal may be dismissed if the appellant fails to cite the alleged rule violation(s).

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 (written reprimand), the Department has the burden of proof to demonstrate that its decision was within its discretion and appropriate under the circumstances.

The Department has proven, by a preponderance of the evidence, that Appellant has violated CSR §16-51 A. 5, failure to observe departmental regulations, and CSR §16-51 A. 10), failure to comply with the instructions of an authorized supervisor. The Department has not established a violation of CSR §16-51 A. 6), carelessness in

performance of duties and responsibilities.

Appellant's misconduct arises from two different, though inter-related, actions. First, she failed to follow the Department's chain of command and sent a memo directly to Maj. Connors rather than routing the information contained in the memo through Sgt. Butts. The second instance is the content of the memo itself and Appellant's decision to conduct the evaluation of Rev. Scott's workspace despite Maj. Connors' response that the evaluation would not be done until after Rev. Scott was moved into a new workspace.

Appellant testified that she felt she was acting responsibly by sending the memo to Maj. Connors and by conducting the evaluation despite Maj. Connors response to Rev. Scott. The Hearing Officer does not doubt Appellant's sincerity on this point. However, Appellant was given specific instructions about the need to follow the chain of command at least once (in the December 2001 Outline of Duties and Expectations) and, according to Sgt. Butts, on several occasions. The Hearing Officer does not believe Appellant's contention that, until May 9, 2002, she did not know what was meant by the chain of command. Appellant is an intelligent woman. She has worked in the Department for eleven years. The concept of chain of command permeates the workings of the Department. Admittedly, for several years Appellant had the direct ear of the Undersheriff, but after December 2001, she was informed that she had to conduct all her activities through the chain of command. Even if Appellant was unsure what was meant by the term, she had an obligation to ask Sgt. Butts when she was given the Outline of Duties.

Simply put, there is no reason for Appellant not to follow the chain of command and route her concerns through Sgt. Butts. This would have alleviated two things – time would not have been wasted conducting a non-emergency evaluation of the workspace, which was already scheduled to be redone, and, even more importantly, Rev. Scott would have received the new chair (arguably the only "emergency" situation) several days earlier than he did.

The second problem for Appellant was that she was insubordinate towards Maj. Connors in two ways.

The tone of Appellant's memo was inappropriate even if the information she was conveying was necessary for Maj. Connors. The Hearing Officer, being a neutral reader, finds that it is condescending. Appellant, had she routed the memo through Sgt. Butts, might have reworked the tone of the memo so that its message was softened, thereby not offending Maj. Connors, assuming that the memo was sent on to the Major.

Then, she went on to conduct the evaluation, which was contrary to Maj. Connors' instructions that no evaluation was to be conducted at the time. The Hearing Officer notes that Maj. Connors' response was sent directly to Rev. Scott and that Appellant was only a "cc" on the memo. But a reasonable person should have been able to infer that Maj. Connors meant that Appellant was not to conduct the evaluation.

Appellant did not comply with the Department's regulations concerning disobeying a lawful order of a supervisor (Department Regulation 200.12) and the regulation regarding disrespectful or insolent behavior towards a supervisor (DSD Rule 200.14). Therefore, she violated CSR §16-51 A. 5). Similarly, she violated the CSR Rule that deals directly with failing to comply with the instructions of a supervisor, CSR §16-51 A. 10).

Appellant was not being careless in performing her duties. In fact, she felt she was being responsible towards both herself and the Department. Her concern that there was a potential for liability if an injury occurred to Rev. Scott that might have been avoided by the

evaluation was reasonable. The violation of CSR §16-51 A. 6) is dismissed.

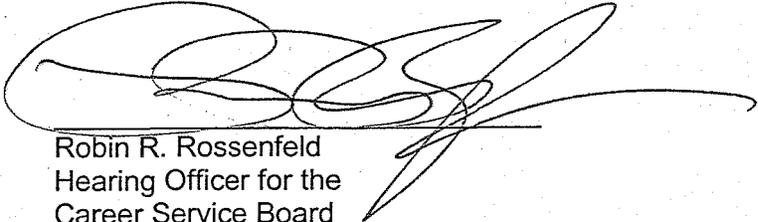
The last question before the Hearing Officer is the appropriate sanction. Mr. Oliva explained that, when someone is given an instruction to do or not do something, it is necessary to follow it. He testified that he denied the grievance at the second level because Appellant failed to follow a direct order not to perform the evaluation.

The Hearing Officer agrees with Mr. Oliva that the Written Reprimand was appropriate. Appellant was instructed not to conduct the evaluation; she did it any way. She was told to follow the chain of command; she sent the memo directly to Maj. Connors. The Hearing Officer had the opportunity to observe Appellant during the hearing. She is a well-spoken and composed woman. The Hearing Officer can only conclude that Appellant knew exactly what she was doing by ignoring both Sgt. Butts' instructions that she work through the chain of command after December 2001 and by sending the memo/conducting the evaluation despite Maj. Connors' directions. The Written Reprimand was the appropriate sanction to get the message through to Appellant that her actions have consequences and that she must comply with the department's Rules and Regulations.

ORDER

Therefore, for the foregoing reasons, the Hearing Officer MODIFIES the Written Reprimand. The violations of CSR §§ 16-51 A. 5) and 7) are AFRIRMED and the violation of CSR §16-51 A. 6) is DISMISSED.

Dated this 30th day of December 2002.


Robin R. Rossenfeld
Hearing Officer for the
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing FINDINGS AND ORDER by depositing the same in the U.S. mail, this 30th day of December 2002, addressed to:

Anneesah Nnunukwe
12990 E. 47th Ave.
Denver, CO 80239

Cheryl Hutchison
AFSCME
3401 Quebec Street, #7500
Denver, CO 80207

I further certify that I have forwarded a true and correct copy of the foregoing FINDINGS AND ORDER by depositing the same in interoffice mail, this 30th day of December 2002, addressed to:

Robert Nesor
Assistant City Attorney
Employment Law Section

Fred Oliva
Denver Sheriff Department

Tracy Howard
Manager of Safety

Virginia Granado